95-1750

Supreme Court, U.S.
FILED
APR 25 1996
CLERK

Docket Number: _____

IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1995

CHRISTOPHER NOLEN, )
)
Petitioner, )
)
- versus - )
)
STATE OF GEORGIA, )
)
Respondent. )

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

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# PETITION FOR WRIT OF CERTIORARI

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## A. QUESTION PRESENTED FOR REVIEW:

Whether the immediate suspension of a motorist's driver's license under the State of Georgia's Administrative License Suspension statute (O.C.G.A. Section 40-5-67 and 67.1), following a hearing before the Georgia Department of Public Safety, and arising out of the motorist's arrest for Driving Under the Influence of Alcohol or Drugs (O.C.G.A. Section 40-6-391), constitutes a prior proceeding and punishment sufficient to invoke the protections of both the "Double Jeopardy Clause" of the Fifth Amendment of the United States Constitution (the "Double Jeopardy Clause") and Article I, Section I, Paragraph XVII of the Georgia Constitution, thereby precluding subsequent prosecution of the arrested motorist for DUI.

## B. LIST OF PARTIES:

All parties to this action are listed in the case caption.

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1. "Letter Withdrawing Suspension of Driver's License, " Captain R.D. Harper, Georgia Department of Public Safety, August 15, 1994

2. "Transcript of Proceedings on Defendant's Motion for Discharge and Acquittal Based on Double Jeopardy," State of Georgia v. Christopher Nolen, State Court of Gwinnett County, Accusation No. 94D-2463-2, March 22, 1995, pp. 34-37. (transcription of judge's oral comments regarding basis of denial only)

3. "Order," (denying Motion for Discharge and Acquittal based on Double Jeopardy) State of Georgia v. Christopher P. Nolen, State Court of Gwinnett County, Accusation No. 94D-2463-2, March 22, 1995.

4. Nolen v. The State, Moore v. The State, 463 S.E.2d 504 (Ga.App. 1995) (decided October 2, 1995, reconsideration denied October 26, 1995).

5. Nolen v. The State, Georgia Supreme Court, Case No. A95A1570, cert. denied January 26, 1996.

**E. STATEMENT OF BASIS OF JURISDICTION:**

Petitioner seeks certiorari from the United States Supreme Court to review the order of the Georgia Supreme Court denying his petition for writ of certiorari, issued on January 26, 1996. The petition for certiorari to the Georgia Supreme Court sought to review the judgment of the Georgia Court of Appeals, issued on October 2, 1995 (reconsideration denied October 26, 1995) affirming the order of the State Court of Gwinnett County, entered on March 22, 1995, denying petitioner's Motion for Discharge and Acquittal Based on Double Jeopardy.

The ultimate question to be decided in this matter centers on the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, as applied to each of the States through the Fourteenth

Amendment of the Constitution, and Article I, Section I, Paragraph XVII of the Georgia Constitution. Petitioner asserts that under Rule 10(c) of the United States Supreme Court Rules, that this is a crucial question of federal constitutional law that should be settled by this Court. Furthermore, the decision of the Georgia Court of Appeals affirming the denial of petitioner's Motion for Discharge and Acquittal Based Upon Double Jeopardy and the Georgia Supreme Court's denial of petitioner's subsequent petition for writ of certiorari, concluding that the Double Jeopardy Clause of both the United States and Georgia Constitutions are not implicated in the immediate suspension of a motorist's driver's license prior to prosecution for the underlying DUI charge, conflicts with this Court's earlier decisions in the case of United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), Austin v. United States, 509 U.S. ____, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) and Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ____, 128 led. 2d 767, 114 S.Ct. 1939 (1994).

## F. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE:

1. Constitution of the United States, Amendment V "Rights of Accused in Criminal Proceedings"

2. Constitution of the State of Georgia, Article I, Section I, Paragraph XVIII "Jeopardy of Life or Liberty More Than Once Forbidden"

3. 23 U.S.C. Section 408, "Alcohol Traffic Safety Programs."

4. 23 U.S.C. Section 410, "Drunk Driving Prevention Programs."

5. Official Code of Georgia Annotated (O.C.G.A.), Section 40-5-55, "Implied Consent to Chemical Tests."

6. Official Code of Georgia Annotated (OCGA), Section 40-5-67, "Seizure and Disposition of Driver's License of Persons Charged with Driving Under the Influence; Issuance of Temporary Driving Permit; disposition of Cases."

7. O.C.G.A. Section 40-5-67.1, "Administration of Chemical Tests; Rights of Motorists;" Reporting of Test Results; Refusal to Submit; Suspension or Denial; Hearing and Review; Compensation of Officers Attending Hearings."

8. O.C.G.A. Section 40-5-67.2, "Terms and Conditions for Suspension of License Under Subsection (c) of Code Section 40-5-67.1.

9. O.C.G.A. Section 40-6-391, "Driving Under the Influence of Alcohol or Drugs; Penalties for First and Second Offenses; Publication of Notice of Conviction for Persons Convicted for Third Time; Endangering a Child."

## G. STATEMENT OF THE CASE:

Petitioner Paul Nolen was arrested for DUI on May 28, 1994 at which time he was issued an "Official Notice of Intent to Suspend License." He requested and received an administrative license suspension hearing pursuant to O.C.G.A. Section 40-5-67.1 to determine whether his driver's license suspension should be sustained. The hearing was conducted on August 11, 1994 by an administrative law judge (ALJ) from the State of Georgia Department of Public Safety. On August 15, 1994, Nolen was notified by the ALJ, acting on behalf of the Department of Public Safety, that the suspension had been rescinded. "Letter Withdrawing Suspension of Driver's License," Captain R.D. Harper, Georgia Department of Public Safety, August 15, 1994.

Nolen then filed a Motion for Discharge and Acquittal Based on Double Jeopardy with the State Court of Gwinnett County on March 17, 1995, asserting that the State's continued prosecution of the DUI charge constituted double jeopardy under both the Fifth Amendment of the United States Constitution and Article I, Section I, Paragraph XVIII of the Georgia Constitution, in that the license suspension hearing constituted a prosecution and potential punishment barring subsequent prosecution on the DUI charge. Nolen's motion was heard on March 22, 1995, after which the State Court of Gwinnett County, in a terse, one paragraph order, denied the motion. "Order," State of Georgia v. Christopher P. Nolen, State Court of Gwinnett County, Accusation No. 94D-2463-2, March 22, 1995. In its statement from the bench concluding the hearing, however,

the trial court determined that double jeopardy did not apply based on its conclusion that the administrative license suspension action and the DUI prosecution involved different parties from two different branches of government, and that the suspension served a valid remedial purpose. "Transcript of Proceedings on Defendant's Motion for Discharge and Acquittal Based on Double Jeopardy," State of Georgia v.Christopher Nolen, State Court of Gwinnett County, Accusation No. 94D-2463-2, March 22, 1995, pp. 35.

Nolen subsequently filed a direct appeal to the Georgia Court of Appeals on March 28, 1995. The Georgia Court of Appeals affirmed the denial of Nolen's motion on October 2, 1995 concluding that the purpose of an administrative license suspension is to protect public safety and is therefore remedial in nature. The Court also concluded that the incidental deterrent/punitive effect was insufficient to qualify the sanction as punitive for the purposes of double jeopardy, and that the license suspension and DUI prosecution did not constitute two separate prosecutions. Nolen v. The State, Moore v. The State, 463 S.E.2d 504, 507 (Ga.App. 1995). The Court of Appeals denied Nolen's Motion for Reconsideration on October 26, 1995.

On November 15, 1995, Nolen filed a Petition for Writ of Certiorari to the Georgia Supreme Court seeking review of the Court of Appeals' decision. The Georgia Supreme Court declined to review the decision, denying the petition for certiorari on January 26, 1996, in a one sentence statement. Nolen v. The State, Georgia Supreme Court, Case No. A95A1570, cert. denied January 26, 1996. Petitioner now seeks review of the decision of the Georgia Court of Appeals before this Court.

## H. ARGUMENT:

### 1. INTRODUCTION:

#### A. The Metamorphosis of Double Jeopardy in the Context of Administrative Driver's License Suspensions and DUI Prosecutions:

Within the ambit of administrative suspensions of a motorist's driver's license and DUI prosecutions based on the conduct resulting in the license suspension, the "Double Jeopardy Clause" of the Fifth Amendment of the United States Constitution, has only recently gained widespread

significance as a constitutional safeguard for those motorists charged with DUI. Prior to 1989, Double Jeopardy did not exist as an articulable defense for motorists suffering immediate administrative suspension of their driver's license and facing subsequent prosecution on the underlying DUI charge resulting in the suspension. Within the State of Georgia, the inaccessibility of this constitutional safeguard was the product of earlier, and perhaps outdated state Supreme Court authority.

In separate opinions, the Georgia Supreme Court previously held that the double jeopardy prohibition applies only to twice subjecting an individual to criminal process for the same offense against the same sovereign, but not to a sovereign's imposition of both civil and criminal penalties for the same act. See Cushaway v. State Bar, 120 Ga.App. 371, 170 S.E.2d 732, cert. den. 398 U.S. 910, 90 S.Ct. 1705, 26 L.Ed.2d 810 (1969); United States v. Lepiscopo, 429 F.2d 258 (5th Cir., 1970). Tangentially, the Georgia Supreme Court has also concluded that administrative process constitutes a civil, rather than a criminal action, therefore rendering any Double Jeopardy concerns moot. Alexander v. The State, 129 Ga.App. 395, 397, 199 S.E.2d 918 (1973). Despite these rulings, however, Double Jeopardy has rapidly grown as a constitutional defense to DUI prosecutions, not only within the state of Georgia, but across the nation, despite undoubtedly similar rulings from the high courts of Georgia's sister states.

On a national scale, the proliferation of Double Jeopardy as a constitutional safeguard in DUI cases, despite prior adverse rulings from the high courts of individual states, can trace its roots to two primary origins. First, thirty-seven states, including Georgia, now permit some form of an immediate administrative suspension of a motorist's driver's license upon being arrested for DUI, prior to formal prosecution of the underlying DUI charge giving rise to the license suspension. Lawyers Weekly USA, Feb. 27, 1995, p. 14. The proliferation of the use of the double jeopardy safeguard in DUI cases parallels the recent outbreak of statutory schemes being enacted across the country, mandating immediate suspension of a motorist's driver's license upon being arrested for DUI. The high courts of the states with these relatively new license suspension schemes have struggled to keep pace with the legal ramifications associated with their enactment and subsequent claims of double jeopardy being asserted in DUI cases. Georgia's statutory scheme for the immediate, administrative suspension of a motorist's driver's license upon being arrested for DUI, as contained in O.C.G.A. Sections 40-5-67 and

67.1, for example, post-dates the Georgia Supreme Court decisions referenced above by roughly twenty years.

Georgia's statutory scheme for the immediate suspension of a motorist's driver's license is also quite unique from that of her sister states because of the intertwining of the suspension penalties imposed by its statutory scheme and the post-conviction suspension of a motorist driver's license authorized by Georgia's DUI statute, O.C.G.A. Section 40-6-391. O.C.G.A. Section 40-5-67.1(g)(4) mandates that an acquittal or other disposition other than by conviction of the motorist for the underlying DUI charge, shall result in the termination and deletion of any pre-conviction suspension imposed under Georgia's statutory scheme. In essence, O.C.G.A. Section 40-5-67.1(g)(4) implies that any purported remedial purpose served by an administrative license suspension (the most common rationale used to sidestep a double jeopardy claims in situations such as the one petitioner faces) means nothing if guilt of the underlying DUI charge is not established. In short, by intertwining the administrative suspension with the post-conviction suspension in this manner, O.C.G.A. Section 40-5-67.1(g)(4) stands as evidence of the lack of a remedial intent behind Georgia's license suspension statute.

In any event, the United States Congress did not begin its incentive program for states to enact immediate administrative license suspensions for drivers merely arrested for DUI, until 1982, providing grant money to those states choosing to participate. 23 U.S.C. 408. Following an apparently slow response by the states, these incentives were subsequently enhanced six years later with the passage of the Drunk Driving Prevention Act of 1988, Pub. Law 100-690, 23 U.S.C. Section 410. Georgia's own administrative license suspension scheme was enacted only recently, in 1992, in response to the aforementioned congressional enhancements, pursuant to the recommendations of the National Safety Council.. Drunk Driving Prevention Act of 1988: hearing on S. 2367 before Sen. Comm. on Environment and Public Works, 100th Cong., 2d Sess., S.Hrg. 100-732 (June 29, 1988). Georgia was not alone in responding to the recommendations of the National Safety Council in enacting its statutory scheme for immediate administrative license suspensions of those motorists charged with DUI; virtually all of the 37 states which currently have in place some form of an immediate administrative license suspension scheme have had such schemes in place only since 1982, the majority after the passage of the Drunk Driving Prevention Act of 1988. Lawyers Weekly USA, supra at 14.

The second and more significant reason for the proliferation of the use of the Double Jeopardy safeguard revolves around a series of recent United States Supreme Court authority decided in the context of administrative and civil fines, taxes and forfeitures. These cases, beginning with the case of United States v. Halper, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989), and continuing with Austin v. United States, 509 U.S. ____, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) and Department of Revenue of Montana v. Kurth Ranch, 511 U.S.____, 128 L.Ed.2d 767, 114 S.Ct. 1939 (1994) form the backbone of petitioner's application and any subsequent appeal he should present should this Court see fit to grant certiorari. These three cases, singularly and in conjunction with each other, have also cast considerable doubt on the prior rulings of the Georgia Supreme Court, and petitioner would assert, the prior rulings of the high courts of Georgia's sister states which have held that civil and administrative proceedings do not qualify to invoke the protections of the Double Jeopardy Clause for the purposes of barring a subsequent criminal prosecution.

In the instant case, petitioner seeks to reconcile, in his favor, the conflict between existing Georgia authority and the authority of the United States Supreme Court as handed down in the aforementioned cases in determining whether the double jeopardy analyses undertaken in those cases should apply to his own. Any ruling on petitioner's claims, in addition to resolving seven years of conflict, controversy and confusion surrounding the use of the Double Jeopardy safeguard in Georgia DUI cases, could potentially have far-reaching consequences on the use of Double Jeopardy as a safeguard in the context of administrative driver's license suspensions and DUI prosecutions on a national scale. This Court has the opportunity to decide, once and for all, how best to resolve the tension presented by those state statutory schemes mandating immediate license suspensions based on a DUI arrest, subsequent DUI prosecutions based on the conduct leading to such suspensions, and a motorist's constitutional right to be free from Double Jeopardy. Given the fact that this tension directly implicates the constitutional right of thousands of motorists, the thirty-seven states which currently have some form of administrative license suspension in place would be well served in receiving some direction from this Court as to how best to address this relatively new and novel issue.

B. The Double Jeopardy Clause:

The "Double Jeopardy Clause" of the Fifth Amendment of the United States Constitution, provides that no person ". . . be subject for the same offence to be twice put in jeopardy of life or limb." This clause applies to each of the States through the Fourteenth Amendment of the United States Constitution. Likewise, Article I, Section I, Paragraph XVIII of the Georgia Constitution provides that no person ". . . shall be put in jeopardy of life or liberty more than once for the same offense. . . "

The constitutional guarantee against double jeopardy affords protection against efforts to impose multiple punishments for the same offense. This protection applies with equal force regardless of whether the first prosecution results in a conviction or an acquittal. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Multiple punishments are only permissible if they are imposed in the same proceeding. They are barred if imposed in separate proceedings. Missouri v. Hunter, 459 U.S. 359, 368-369, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

In petitioner's case, the Georgia Court of Appeals has determined that a civil administrative license suspension proceeding does not constitute a separate prosecution for the purposes of double jeopardy, under either the United States or the Georgia Constitutions. The Court has also concluded that the suspension of a driver's license does not constitute a punishment, given the ostensibly remedial nature of such a suspension. Nolen v. The State, Moore v. The State, 463 S.E.2d 504, 507 (Ga.App. 1995). Petitioner asserts that the Court of Appeals' determination on both aspects of his double jeopardy claim are not only erroneous, but conflict with this Court's prior determinations, from 1989 to 1994, with respect to the elements which must be considered in determining whether double jeopardy applies and whether those elements have been properly assessed.

If the Georgia Court of Appeals were to utilize the standards for assessing a double jeopardy claim set forth by this Court and by the Ninth Circuit Court of Appeals in their prior decisions, petitioner would assert that they too would arrive at the inevitable conclusion suggested by petitioner: that the immediate administrative suspension of his driver's license constitutes a separate proceeding and punishment barring subsequent prosecution of petitioner for the same conduct underlying the DUI charge. Petitioner contends that the standards previously set forth by this Court in assessing a double jeopardy claim are appropriate for any

criminal case. The fact that the offense for which petitioner is charged happens to be a DUI certainly does not change the nature of the constitutional considerations which must taken into account.

## 2. THE UNITED STATES SUPREME COURT'S ANALYSIS OF DOUBLE JEOPARDY IN THE CONTEXT OF CIVIL FINES, FORFEITURES AND "TAXES."

### A. Double Jeopardy Analyses Prior to Halper:

As stated earlier, the proliferation of Double Jeopardy claims in cases involving immediate administrative suspension of a motorist's driver's license and DUI prosecutions based on the conduct resulting in the suspension, owes much of its roots to this Court's ruling in Halper v. United States. Until Halper, it was widely acknowledged, even by this Court, that civil sanctions did not constitute punishment, including sanctions arising out of civil forfeiture proceedings or administrative actions. Just five years before Halper, this Court held that if the legislature indicated a preference that a particular proceeding be denominated as "civil," rather than "criminal," the Court would defer to that preference, except in extraordinary circumstances, and that the Double Jeopardy Clause would not bar a second criminal proceeding. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984); United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980).

This Court previously reasoned that a "civil" action, such as a forfeiture for example, did not constitute a "punishment," so long as the legislature intended the "civil" action to be a remedial sanction. Id. In short, the Court was willing to forego a constitutional analysis as to whether a sanction constituted a punishment based simply on a legislatively determined label. Likewise, in the State of Georgia, the distinction between a "civil" versus a "criminal" label attached to a proceeding appears even now to take precedence over a typical double jeopardy analysis. The Georgia Supreme Court has held that the imposition of criminal punishment and administrative sanctions for the same act does not constitute a violation of the double jeopardy prohibition. Carruth v. Alt, 231 Ga. 547, 203 S.E.2d 158 (1974). And as mentioned in petitioner's introduction, the Georgia Supreme Court has declined to undertake a double jeopardy analysis where double jeopardy has been pled to a criminal action as a result of the imposition of civil or administrative sanctions.

Middlebrook v. Allen, 234 Ga. 481, 216 S.E.2d 331 (1975); Alexander v. The State, 129 Ga.App. 395, 199 S.E.2d 918 (1973).

B. United States v. Halper:

Recent rulings from this Court, which form the groundwork of the instant petition, now suggest that abandoning a double jeopardy analyses on the basis of a legislatively imposed label such as "criminal" or "civil," is constitutionally improper. The watershed case in this respect is United States v. Halper, decided in 1989, wherein this Court rejected its own "labeling" test for double jeopardy purposes. U.S. v. Halper, supra, 490 U.S. 435. Given the multiple interpretations which may be discerned from the court's opinion in Halper, Halper in and of itself is not the defining analysis in determining whether the particular sanction in the instant case, immediate suspension of petitioner's driver's license, may be deemed punitive for double jeopardy purposes. The holding arising out of Halper, however, is the linchpin of the subsequent decisions of this Court rendered in Austin and in Kurth Ranch, which petitioner asserts form the framework of a proper double jeopardy analysis. For the moment, Halper's primary significance lies in the fact that this Court opinion gave birth to the notion that whether a sanction is denominated as civil or criminal is largely irrelevant in assessing whether that particular sanction is punitive in nature - i.e., that labels do not matter.

In Halper, the defendant was convicted of sixty-five violations of a federal criminal false claims statute, each involving a $12 demand for reimbursement for medical services worth only $3. Halper was subsequently convicted, and the government filed a separate "civil" action seeking recovery of a $2,000.00 penalty per violation for a total of $130,000.00. The District Court held that imposition of this penalty violated the Double Jeopardy Clause by punishing Halper a second time for the same conduct for which he had been convicted. Id., 490 U.S. 437-439.

In affirming this ruling, this Court rejected the government's contention that the Double Jeopardy Clause should only apply to punishment imposed in a criminal proceeding. As this Court noted, "the labels 'criminal' and 'civil' are not paramount in determining whether a sanction constitutes punishment," for the purposes of a double jeopardy inquiry and the notion of punishment "cuts across the division between the civil and criminal law." United States v.Halper, supra. at 447-448. Likewise, recent attempts by the federal government to circumvent a double jeopardy analyses by characterizing civil forfeiture proceedings as merely "administrative" in nature, and thus not

an actual criminal proceeding for the purposes of double jeopardy, have also been flatly rejected by the federal courts. Quinones-Ruiz v. United States, 864 F. Supp. 983, 986 (S.D.Cal. 1994).

Thus, the mere fact that a legislative body might choose to describe a civil penalty as a "remedial civil sanction" does not foreclose the possibility that such a sanction incorporates a punitive character running afoul of the Double Jeopardy Clause. The fact that the State of Georgia may argue that petitioner's administrative license suspension constitutes a "remedial civil sanction" certainly does not negate the fact that such a sanction incorporates a clearly punitive character regardless of how one chooses to characterize the right to operate an automobile. As this Court noted, the government's reliance on federal law denoting that the penalty sought to be imposed on Halper was indeed civil in nature and the fact that the civil remedy did not rise to the level of "punishment" because Congress allowed recovery in excess of the government's actual damages, did not foreclose the possibility that a civil penalty, even one authorized by a congressional act, may be " . . . so divorced from the Government's damages and expenses as to constitute punishment." United States v. Halper, supra. at 442.

In concluding that labels were irrelevant for double jeopardy purposes, this Court's intent was obviously to prevent a double jeopardy analysis from being short-circuited on the basis of an arbitrary title or label attached to a particular proceeding or sanction. Halper certainly precludes the State of Georgia, or any other prosecutorial agency from pre-empting a motorist's claim of double jeopardy on the grounds that the suspension of his or her driver's license constitutes a civil/administrative remedial action and sanction rather than a criminal proceeding and penalty. But petitioner is obliged to point out that the primary holding arising out of Halper which has given root to the rapid metamorphosis of Double Jeopardy claims in connection with immediate administrative license suspensions and DUI prosecutions based on the conduct giving rise to such suspension is not so much the issue of labels, but rather, how to determine whether a civil sanction constitutes punishment for the purposes of a proper double jeopardy analysis. The Court answered this inquiry as follows:

> . . . a civil sanction that cannot be fairly said to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment, as we have come to understand the term. Id. at 448.

Ironically, this standard, if left standing alone, would probably be deemed to have little application to petitioner's case, since the Court took great pains to point out that this rule would be one for the "rare case, the case such as the one before us," where a small gauge offender would be subject to a sanction "overwhelmingly disproportionate to the damages he has caused." Id. at 449. Subsequent decisions rendered by this Court, however, clearly suggest that the force of this ruling has been underestimated, and that at the present time, Halper is merely the starting point for a proper assessment of the elements comprising a double jeopardy claim. Any limitation in the use of the Court's standard in assessing whether a civil sanction constitutes punishment for purposes of assessing a double jeopardy claim has since evaporated with this Court's subsequent rulings in Austin and in Kurth Ranch, both of which have expanded the considerations underlying a proper double jeopardy analysis, applicable to virtually all forms of criminal prosecution.

C. Austin v. United States:

Although this Court may have originally intended to limit the holding in Halper to its specific facts, the precise language of the analysis used to assess Halper's double jeopardy claim was specifically affirmed and re-adopted four years later in the case of Austin v. United States, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). In a unanimous decision, this Court expanded its holding in Halper by determining that a civil forfeiture action under 21 U.S.C. Sec. 881(a)(7), a federal drug related forfeiture provision, would fall under the double jeopardy analysis enunciated in Halper, leading to the conclusion that a forfeiture constitutes punishment. Petitioner contends that Austin is the one case most responsible for expanding the scenarios in which this Court's analysis of double jeopardy in Halper would be applicable, including petitioner's case.

In Austin, the defendant pled guilty to one count of possession of cocaine with intent to distribute. Subsequent to this plea, the United States filed a forfeiture action seeking to seize Austin's mobile home and auto body shop, locations where Austin was alleged to have distributed cocaine. Austin responded to the forfeiture action by claiming that the seizures would violate his Eighth Amendment right to be free from excessive fines. Austin v. United States, supra. 125 L.Ed. at 494.

The government attempted to circumvent this problem by asserting that the forfeiture statute at issue, 21 United States Code Section 881(a)(4) and (a)(7), was remedial in two respects, rather than punitive, and therefore not

subject to the Eighth Amendment. First, the statute served to remove the "instruments" of the drug trade "thereby protecting the community from the threat of continued drug dealing." Second, the forfeited assets served to compensate the government for the expense of law enforcement activity and other problems caused by the drug trade. Id. at 504.

In rejecting this argument, this Court unanimously reaffirmed the very holding in Halper giving rise to the notion that a sanction may be characterized as punishment, even if it is labeled as primarily remedial:

> Fundamentally, even assuming that Section 881(a)(4) serves some remedial purpose, the Government's argument must fail. `[A] civil sanction that cannot fairly be said solely [emphasis in original] to serve remedial purpose, but rather can only be explained as also serving either retributive of deterrent purposes, is punishment as we have come to understand that term. Id., at 505, citing Halper, supra., at 448, 104 L.Ed. 487, 109 S.Ct. 1892.

Utilizing this standard as a backdrop, this Court then offered the following three-prong analysis in determining that the civil sanction, forfeiture, constituted punishment.

First, the Court noted that the ". . . historical understanding of forfeiture as punishment" weighed heavily in favor of the conclusion that forfeiture continued to serve punitive purposes. Second, the Court discerned a punitive purpose from "the clear focus of [the forfeiture statutes] on the culpability of the owner." Finally, the fact that the forfeiture at issue was tied directly to the commission of a crime made inescapable the court's conclusion that the forfeiture statute at issue did not serve solely remedial purposes. Id., at 505.

This very holding and analysis was reaffirmed less than one year later in United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994) in which the Ninth Circuit Court of Appeals was confronted squarely with the issue of whether the government's continued pursuit of a civil forfeiture action against defendants already convicted of the criminal offenses underlying the forfeiture action, were barred by double jeopardy. In this case, the defendants were convicted of money laundering and conspiracy to manufacture drugs. Following their convictions, the government moved for summary judgment on the civil forfeiture action which sought to recover cash, aircraft, automobiles

and boats alleged to have been obtained through the crimes for which defendants were prosecuted. Summary judgment was granted by the district court in favor of the government. Id., at 1214-15.

The Ninth Circuit subsequently reversed the judgment of the district court, undertaking a double jeopardy analysis wholly ignored by the district court. Acknowledging its own holdings from a mere decade earlier that forfeitures did not constitute punishment, the Ninth Circuit reversed itself, determining that continued prosecution of the civil forfeiture action would violate the defendants' double jeopardy protection in view of the Austin and Halper cases. Utilizing the Supreme Court's holding in Austin (adopting the language of Halper) in determining that the forfeiture statute at issue constituted punishment the Court noted that,

> [the Supreme Court] reaffirmed its new found wisdom emphasizing again that a sanction which is designed **even in part to deter or punish will constitute punishment**, regardless of whether it also has a remedial purpose. See Austin v. United States, supra. 113 S.Ct. 2801, 2806, 2812, cited in United States v. $405,089.23 U.S. Currency, supra. 33 F.3d at 1219.

The Ninth Circuit proceeded to utilize the three prong approach established by the Supreme Court in Austin to determine whether a particular sanction could be deemed to serve solely remedial purposes, thereby rendering any double jeopardy considerations moot, or whether it constituted punishment triggering a double jeopardy claim. In applying these three prongs to the forfeiture statute before it, the Ninth Circuit noted that first, "because of the historical understanding of forfeiture as punishment," that there would be strong presumption that any forfeiture statute would not serve solely a remedial purpose. Second, the Court noted that in instances where such a statute did focus on the culpability of a property owner, it was highly likely that the enactment served at least in part to deter and punish guilty conduct. Finally, since it appeared Congress had tied forfeiture directly to the commission of a specified offense, the Court concluded it would be reasonable to presume that the forfeiture statute was at least partially intended as an additional deterrent to or punishment for those violations of law. United States v. $405,089.23 U.S. Currency, supra. 33 F.3d at 1221.

It is petitioner's understanding that United States v. $405,089.23 U.S. Currency is currently pending before this Court. Assuming that the Court

determines that the application of the double jeopardy analysis utilized in Austin should stand, petitioner would assert that the three prong approach adopted by this Court would clearly apply to petitioner's case as will be discussed below. Analysis of petitioner's double jeopardy claim, however, does not end with Austin, this Court having further expounded upon the elements that should be considered in a double jeopardy claim in the case of Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ____, 114 S.Ct. 1937, 128 L.E.2d 767 (1994).

D. Department of Revenue of Montana v. Kurth Ranch:

In Kurth Ranch, this Court considered the double jeopardy consequences involved in the imposition, by the State of Montana, of a civil drug tax on any person arrested for the possession or storage of dangerous drugs. Under the provisions of this act, entitled "The Dangerous Drug Tax Act," the tax was to be collected only after any state or federal fines or forfeitures had been satisfied. Taxpayers under this law were required to file a tax return only after their arrest for a violation of a drug-related law. Id., 114 S.Ct. at 1939-1940.

The Kurths, the defendants in this case, pleaded guilty to drug charges, after which the Montana Department of Revenue attempted to collect the drug tax mandated by the drug tax act. The Kurths subsequently filed for bankruptcy and the bankruptcy court sustained the Kurths' objection to the tax on the grounds that it constituted a form of double jeopardy. This judgment was affirmed by both the District Court and the Court of Appeals which held that a Halper inquiry, as to whether the sanction was rationally related to the damages suffered by the government, was controlling. Id.

It is important to note that this Court declined to utilize a Halper analysis in assessing whether the drug tax constituted a form of punishment, as Halper did not decide ". . . the different question of whether Montana's tax should be characterized as punishment." Id., at 1944. In other words, this Court chose not to utilize Halper because "Halper did not consider whether a tax may be similarly be characterized as punishment." Id., at 1945. This Court did, however, adopt the very language which made Halper such a watershed case in rejecting the government's argument that double jeopardy should not apply merely because the sanction in question was a tax rather than a civil penalty: "In making such an assessment, "the labels 'criminal' and 'civil' are not of paramount importance."" Id., at 1945, citing Halper, supra. at 448. As the Court noted, "[A] tax is not immune from double jeopardy scrutiny simply

because it is a tax." Department of Revenue of Montana v. Kurth Ranch, supra. 114 S.Ct. at 1946.

Confronted squarely with the issue of whether a purely civil tax could constitute a type of second punishment barred by the Double Jeopardy Clause, this Court concluded that the punitive nature of the drug tax in question amounted to the functional equivalent of a successive criminal prosecution that placed the defendants in jeopardy a second time for the same offense. Id., at 1945. In reaching this conclusion, the Supreme Court pointed to five specific features of the drug tax in question which so closely parallel the features of Georgia administrative license suspension procedures that petitioner would urge that the analysis presented in Kurth Ranch provides the proper framework in which to assess his own double jeopardy claim.

First, as the Court has noted, the drug tax at issue was conditioned on the commission of a crime, namely possession of drugs with intent to sell. This condition alone, the Court concluded, was "significant of penal and prohibitory intent." The Court arrived at this conclusion despite the fact that the Montana Supreme Court had previously reversed two lower court decisions holding that the drug tax violated double jeopardy prohibitions. The rationale behind the Montana Supreme Court ruling was that the legislature intended that the drug tax act a civil remedial penalty. Id., at 1944, 1947.

Second, the drug tax in Kurth Ranch was enacted after a person was arrested for the same conduct giving rise to the tax obligation in the first place. Id., at 1947. Third, persons arrested for possession of drugs with intent to sell constituted the entire class of persons subject to the tax. Fourth, the tax at issue was imposed by the same sovereign, the State of Montana, that enacted the criminal sanction, based on the Supreme Court's determination that the Department of Revenue was authorized to act on behalf of the state of Montana. Finally, the tax in Kurth Ranch was not imposed in the same proceedings as the criminal sanctions. These five features led this Court to conclude that the drug tax in question had a deterrent or punitive purpose, was therefore not solely remedial, and thus constituted punishment. This is the very analysis petitioner seeks to have applied to his case. The marked similarity between the features considered by the Court in determining that the drug tax constituted a punishment and the features present in an administrative license suspension, leave little room to suggest that the analysis presented by this Court in Kurth Ranch has no application to petitioner's claim.

3. THRESHOLD CONSIDERATIONS:

Before petitioner can argue why the analyses presented by this Court in Austin and in Kurth Ranch should apply to his particular claim of double jeopardy, one threshold consideration must first be addressed. In its opinion on petitioner's double jeopardy claim, the Georgia Court of Appeals concluded that a driver's license in Georgia is not an absolute right, but rather, "is a privilege that may be revoked for cause." Nolen v. The State, Moore v. The State, 463 S.E.2d 504, 507 (Ga.App. 1995). Using this rationale, the Court of Appeals concluded that an administrative suspension of a driver's license is not comparable to the civil forfeiture of a property right (which the Court acknowledged would constitute punishment) and that the suspension of a privilege necessarily implies that it can only have an incidental deterrent/punitive effect. Id.

Notwithstanding the conflict between the Georgia Court of Appeals' ruling and this Court's determination in Halper and in Austin that a sanction which is designed ". . . even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose," petitioner would assert that Georgia Court of Appeals' implied assertion, that is, that the characterization of holding a driver's license as a mere privilege precludes consideration of its suspension as a punishment for double jeopardy purposes is clearly erroneous. The Fifth Amendment of the United States Constitution clearly specifies that no person shall be deprived of ". . . life, liberty or property without due process of law." Similarly, Article I, Section I, Paragraph XVIII of the Georgia Constitution clearly states that no person ". . . shall be put in jeopardy of life or liberty more than once for the same offense." Under the Georgia Constitution, then, next to a person's life, nothing is more precious than his or her liberty, to which he or she enjoys an inalienable right.

The Georgia Supreme Court has already concluded, on more than one occasion, that the loss of one's driver's license is a restraint on that liberty. [emphasis added] Patterson v. Earp, 257 Ga. 729, 363 S.E.2d 248 (1988); Hardison v. Martin, 254 Ga. 719, 334 S.E.2d 161 (1985). Likewise, this Court has previously held that the suspension of one's driver's license clearly involves an affirmative disability or restraint and that holding a driver's license constitutes enough of a right to warrant constitutional due process considerations. Bell v. Burson, 402 U.S. 535 (1971). Additionally, the parallels between a civil forfeiture and an administrative license suspension are striking. Prior to Halper, it was

commonly understood that seizure of the *res* could never implicate the Double Jeopardy Clause because courts never questioned the "forfeiture of instrumentalities of a crime; such forfeitures are presumed to be remedial." Quinones-Ruiz v. United States, supra at 987. Similarly, a driver's license can certainly be classified as a *res* and as an instrumentality which can be forfeited upon commission of the crime of DUI. Forfeitures have been characterized as "civil" and "administrative" in nature for the purposes of circumventing a double jeopardy analysis. Driver's license suspension proceedings have similarly been characterized in Georgia so as to force consideration of such proceedings outside of the scope of any double jeopardy claim.

Similarities aside, however, the distinction made by the Georgia Court of Appeals that forfeitures constitute a property interest whereas driver's licenses do not, cannot be sufficient to circumvent a double jeopardy analysis of petitioner's claim. The absence of a tangible property interest is not by itself a determining question as to whether double jeopardy should apply. The forfeiture of a liberty interest alone is sufficient to raise double jeopardy concerns. Thus, irrespective of how one chooses to qualify the holding of a driver's license, certainly the right to operate an automobile constitutes such a liberty interest that its restraint or loss would clearly qualify as a punishment for the purposes of asserting a double jeopardy claim.

4. ANALYSIS OF PETITIONER'S CASE:

A. The Separate Proceeding Issue:

In addition to rejecting the notion that the immediate suspension of a driver's license could constitute punishment for double jeopardy purposes, the Georgia Court of Appeals further declined to find that petitioner's double jeopardy rights had been implicated on the grounds that the administrative license suspension hearing did not constitute a separate "prosecution." Nolen v. The State, at 507. Petitioner must emphasize that he has never asserted that the suspension hearing constituted a "prosecution," as the Court of Appeals opinion suggests, but rather that the hearing constituted a separate "proceeding." Petitioner would contend that the difference between the term "prosecution," and "proceeding," as used in this petition, is quite substantial in his case, especially for the purposes of properly assessing petitioner's double jeopardy claim.

By referring to the administrative license suspension hearing as a "prosecution," the Court of Appeals' opinion suggests that the license suspension hearing in petitioner's case is criminal in character. Such a reference impliedly restricts petitioner's right to raise a double jeopardy defense in Georgia only to those situations involving two criminal prosecutions, which actually represents the current state of Georgia law. See Carruth v. Ault, 231 Ga. 547, 203 S.E.2d 158 (1974). Such a representation fails, however, to give any deference to this Court's determination in Halper, subsequently upheld in both Austin and in Kurth Ranch, that the label attached to a particular proceeding or sanction is irrelevant for the purposes of considering a double jeopardy claim.

Clearly the administrative license suspension hearing concerning petitioner's driver's license constituted a separate "proceeding," whether for double jeopardy or any other purposes. While both the license suspension hearing and the DUI charges are based on the same underlying facts and occurrences, each proceeding is instituted at different times, the license suspension hearing preceding the prosecution on the DUI charge. Whereas the administrative license suspension action constitutes a "civil" or an "administrative" action governed procedurally by the Georgia Administrative Procedure Act, the DUI action is a criminal case governed by the Georgia Code of Criminal Procedure. O.C.G.A. Section 40-5-67.1(h).

While the "civil" case, the administrative license suspension hearing, has already been resolved by letter from the Department of Public Safety withdrawing the suspension of petitioner's driver's license, the "criminal" case has yet to proceed to trial in the State Court of Gwinnett County. In the administrative license suspension hearing, the State's interests are represented by the arresting officer. In the DUI prosecution, the State is represented by the Solicitor's office. In the administrative license suspension hearing, the standard of proof governing suspension is a "preponderance of the evidence" standard, while in the criminal DUI case, the standard governing conviction is "beyond a reasonable doubt." In the administrative license suspension hearing, final adjudication is made by a hearing officer, an Administrative Law Judge. In the criminal DUI prosecution, final adjudication is made by the jury or a judge.

For the purpose of asserting a valid double jeopardy claim, the administrative license suspension hearing unquestionably constitutes a separate proceeding from the DUI prosecution. As such, the determination

by the Georgia Court of Appeals that the administrative license suspension hearing did not constitute a separate "prosecution" is wholly irrelevant to a proper consideration of petitioner's double jeopardy claim in light of this Court's prior rulings in Halper, Austin and Kurth Ranch. The proper inquiry instead, is whether the suspension hearing constitutes a separate proceeding.

As this Court noted in Kurth Ranch, the fact that the tax proceedings were civil and the prosecution on the marijuana charges were criminal was irrelevant for purposes of double jeopardy, so long as they both involved the same offense and both were intended as punishment. Thus, despite the fact that both proceedings began at the same time, involved the same parties and involved the same issues, this Court had little difficulty in declaring the civil and criminal cases to be separate from one another:

> Nor does [Montana's drug tax] statute require us to comment on the permissibility of "multiple punishments" imposed in the same proceeding [citations omitted] since [the present case] involves separate sanctions imposed in successive proceedings. [emphasis in original] Department of Revenue of Montana v. Kurth Ranch, supra. 114 S.Ct. at 1946.

Similarly, the Ninth Circuit, in rejecting prior holdings from the Second and Eleventh Circuits asserting that a criminal prosecution and a parallel civil forfeiture action were not separate proceedings for double jeopardy purposes, concluded that the government's parallel civil-criminal cases constituted two separate proceedings.

> [W]hether or not two actions are brought as part of a "single, coordinated prosecution" is irrelevant for the purposes of the Double Jeopardy Clause: a civil forfeiture action which is brought and tried separate from a criminal prosecution and is based upon the same offense constitutes a separate "proceeding." United States v. $405,089.23 U.S. Currency, supra., 33 F.3d at 1218. See also United States v. One Single Family Residence, 13. F.3d 1493, 1499 (11th Cir. 1994) and United States v. Milan, 2 F.3d 17 (2d Cir. 1993).

The Ninth Circuit further noted that this Court had earlier

> . . . made clear that parallel actions, instituted at about the same time and involving the same criminal conduct, constitute separate proceedings for double jeopardy purposes. Id., at 1217-1218, citing Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977).

Consequently, any issue as to whether the administrative license suspension constitutes a "separate proceeding," is one that should clearly be resolved in petitioner's favor, given this Court's recent analysis of this very issue in Halper, Austin and Kurth Ranch and given the Court of Appeals' reliance in denying petitioner's double jeopardy claim on what appears to be an irrelevant mischaracterization of the nature of the suspension hearing.

B. The Punishment Issue:

1. Introduction:

The punishment-remedy tension present in the sanctions at issue in Halper, Austin and Kurth Ranch represent the central focus of this Court's prior analyses of the double jeopardy claims raised in these cases. Assuming that this Court determines that those prior analyses are proper in assessing a claim for double jeopardy, the ultimate question upon which petitioner seeks this Court's guidance is whether these standards may be extended to petitioner's case. Petitioner contends that if the standards delineated by this Court in these three cases can be applied to his case without distortion, then these three cases provide the correct standard for a proper consideration of petitioner's double jeopardy claim . Given the marked similarities between the civil/administrative proceedings and criminal prosecutions identified in each of these three cases to the administrative license suspension proceeding and the DUI prosecution present in petitioner's case, petitioner would ultimately assert that this Court's decisions in Halper, Austin and Kurth Ranch are not only controlling, but necessary to a proper consideration of his double jeopardy claim.

2. Application of the Austin Analysis to Petitioner's Case.

Utilizing the three part test advanced in Austin, the following can be discerned upon reviewing O.C.G.A. Section 40-5-67, and 67.1, the statutory basis upon which the State of Georgia sought to suspend petitioner's driver's license. Petitioner would note that the Georgia Court of Appeals, in passing on his double jeopardy claim, acknowledged that the suspension of one's driver's license has at least an incidental deterrent effect. Nolen v.State, supra., at 507. Yet, the Court of Appeals also concluded that because the deterrent effect is only incidental, the sanction of suspension of one's driver's license is "clearly remedial." Id.

On its face, in light of this Court's holding in Halper and in Austin, the Georgia Court of Appeals ruling amounts to a distortion of the analysis undertaken by this Court. Under Halper and Austin, petitioner is not required to exclude all remedial intent in Georgia's administrative license suspension scheme, as the Court of Appeals' opinion seems to suggest, in order to conclude that the scheme constitutes a punishment violative of petitioner's double jeopardy rights. Halper, supra., at 448; Austin, supra., at 2806. But even a plain reading of Georgia's administrative license suspension scheme under the three-prong standard utilized by this Court in assessing Austin's claims evidences a punitive character which far outweighs any remedial intent. Clearly the purpose of the immediate license suspension under Georgia's scheme is deterrence and retribution.

The first prong of the Austin standard requires a consideration of the "historical understanding" of the potential sanction at issue as punishment, weighing heavily in favor of the conclusion that the sanction continues to serve a punitive purpose. Austin, supra., 113 S.Ct. at 2811. The brief of amicus counsel, Robert Chestney, submitted to the Court of Appeals, details the "historical understanding" of a license suspension weighing heavily in favor of the conclusion that license suspensions constitute punishment. As amicus counsel aptly noted, when Congress first commenced its incentive program in 1982 to encourage the individual states to enact their own administrative license suspension schemes, the report of the Committee on Commerce, Science and Transportation on the bill, S. 2158, 97th Cong., 2d Sess. (1982) emphasized that,

> Historically, license revocation has been treated as a discretionary criminal sanction. The Committee

> concluded that license revocation is a highly effective deterrent against drunk driving that should not be used exclusively as a criminal penalty imposed only after lengthy court proceedings. S. Rep. No. 97-360, 97th Cong., 2d Sess. (1982)

Similarly, the report of the National Safety Council, provided in support of congressional enhancement of incentives for states to enact an immediate administrative suspension in 1988 noted that

> . . . any State that is really serious about making further progress in combating drunk driving should enact an administrative license revocation law, so that the enforcement community will have this most important tool for swift and sure punishment of the drunk driver. Drunk Driving Prevention Act of 1988: Hearing on S. 2367 Before the Sen. Comm. on Environment and Public Works, 100th Cong., 2d Sess., S. Hrg. 100-732, p. 24 (June 29, 1988).

Although there is no legislative history surrounding O.C.G.A. Section 40-5-67.1, the Georgia license revocation law at issue in petitioner's claim, it is difficult to overlook the fact that O.C.G.A. Section 40-5-67.1 became state law within four years after enactment of the Drunk Driving Prevention Act. Additionally, the publicity surrounding the enactment of O.C.G.A. Section 40-5-67.1 reflects a clear punitive intent with no mention of any remedial purpose asserted by the State, Senator Harrill Dawkins (D-Conyers, Georgia) commenting that the automatic license suspension would shorten the time between the offense and punishment and drastically reducing the number of no contest pleas entered in DUI cases. Atlanta Constitution, February 6, 1992. Simply stated, it is impossible to argue that the historical understanding, from the perspective of those drafting and enacting the automatic license suspension law, contemplated anything other than punishment. This consideration becomes even more apparent given the complete dearth of any commentary with respect to the remedial aspects of the enactment of O.C.G.A. Section 40-5-67 and 67.1.

The second prong of the Austin standard requires a determination as to whether a punitive purpose may be discerned from the language of the "civil" or "administrative" statute itself, by looking at whether the "clear focus" of the statute centers upon the culpability of the individual against

whom the civil or administrative sanction is sought. Austin, supra, at 505. A plain reading of O.C.G.A. Section 40-5-67.1, which incorporates O.C.G.A. Section 40-5-55, undisputedly centers upon the culpability of the licensee. The class of persons affected by this section and sanction, that is an immediate administrative license suspension, include only those individuals "arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 [DUI]. . . " O.C.G.A. Section 40-5-55. The very first sentence in O.C.G.A. Section 40-5-67 further states:

> Whenever any resident or nonresident person is charged with violating Code Section 40-6-391, the law enforcement officer shall take the driver's license of the person so charged. O.C.G.A. Section 40-5-67.

The third and final prong of the Austin standard requires a consideration of whether the administrative or civil sanction serves solely remedial purposes, in which case the individual's double jeopardy rights are not implicated. If the purpose of the sanction is not solely remedial, then there is an articulable claim of double jeopardy. This Court in Austin determined that this inquiry can be best answered by determining whether the civil sanction is tied directly to the commission of a crime; if so, as petitioner alleges in his case, then the Court is bound to arrive at the inescapable conclusion that the statute does not serve "solely remedial purposes." Id.

In enacting 40-5-67, the Georgia state legislature has clearly tied immediate suspension of a motorist's driver's license directly to the commission of the DUI offense specified in 40-6-391 (see O.C.G.A. Section 40-5-67.1(a)), leading to the conclusion that the threat of a license suspension under 40-5-67.1 is at least partially intended as an additional deterrent to or punishment for violation of Section 40-6-391. Petitioner would also point out that the language of O.C.G.A. Section 40-5-55 used to satisfy the second prong of the Austin test also fits squarely within the requirements of the third prong, as the entire class of individuals subject to the immediate suspension are those arrested for any offense arising out of violation of Georgia's DUI law, O.C.G.A Section 40-6-391.

Notwithstanding the fact that petitioner's case easily satisfies all three prongs elucidated by the Court in Austin, petitioner would continue to emphasize that he is not required, under this Court's authority in Austin and in Halper to exclude the possibility that the license suspension serves some

remedial purpose in order to conclude that it is punishment. The Georgia Court of Appeals even concedes that there is at least an incidental punitive effect arising out of the immediate license suspension statute. Although petitioner is not required to show that punitive effect outweighs the purported remedial effect of the statute, clearly this is the case in Georgia's statutory scheme whether assessed under Austin or under Kurth Ranch.

3. Application of the Kurth Ranch Analysis to Petitioner's Case:

If petitioner's case were to be examined through the framework provided by this Court in Kurth Ranch, the ultimate result remains identical to the one reached in Austin: that the immediate administrative suspension of petitioner's driver's license constitutes a punishment barring subsequent prosecution on the DUI charge. First, like the drug tax at issue in Kurth Ranch, the administrative license suspension in this case was conditioned on the commission of a crime, namely, the offense of DUI. The license suspension statute is clear that a suspension can go into effect upon receipt of a sworn report of a law enforcement officer that he had grounds to believe that the arrestee was in control of a ". . . moving motor vehicle . . . in violation of Code Section 40-6-391." O.C.G.A. Section 40-5-67.1(c). As the Supreme Court has artfully noted, this condition alone is significant of "penal and prohibitory intent." Kurth Ranch, supra. at 114 S.Ct. 1947.

Second, as with the drug tax in Kurth Ranch, the sanction in this case, the administrative license suspension, was enacted only after petitioner was arrested for the same conduct giving rise to license suspension in the first place: driving while under the influence. O.C.G.A. Section 40-5-67.1(c). Third, as in Kurth Ranch, the entire class of persons subject to administrative license suspensions are those charged with a DUI, much like Kurth Ranch where the entire class of persons subject to the tax were those charged with possession with intent to distribute drugs. Id.

Fourth, the administrative license suspension is imposed by the same sovereign enacting the criminal sanction of DUI: the State of Georgia. The two sovereigns in Kurth Ranch happened to be the State of Montana and the Department of Revenue of Montana (a mere representative of the State in the tax proceedings). In the instant case, the two prosecuting authorities are the State of Georgia Department of Public Safety, one of the enforcement arms of the State, and the State of Georgia itself in the underlying DUI charge as represented by the Gwinnett County Solicitor's office. Petitioner would also

note that O.C.G.A. Section 40-5-55, which governs implied consent to chemical tests and which is incorporated in O.C.G.A. Section 40-5-67, states as follows:

> The State of Georgia [emphasis added] considers that persons who are under the influence of alcohol or drugs . . . while operating a motor vehicle constitute a direct and immediate threat to the welfare and safety of the general public. O.C.G.A. Section 40-5-55.

Notwithstanding the remedial tone of this opening statement, this opening leaves the implication that the State of Georgia is ultimately the sovereign which enacts the implied consent procedures leading to administrative license suspensions, enforced through the Georgia Department of Public Safety.

Finally, much as the tax in Kurth Ranch was not imposed in the same proceedings as the criminal sanctions, petitioner's license suspension was the result of a proceeding wholly separate from the DUI prosecution. Each of these factors led this Court to conclude that the drug tax in Kurth Ranch had a deterrent or punitive purpose, and could therefore not be deemed to be solely remedial. In similar fashion, this Court is urged to find that the administrative license suspension in petitioner's case had a deterrent or punitive purpose, and that the Georgia's statutory scheme for immediate license suspension cannot be deemed to be solely remedial.

Ultimately, it is important to note that the administrative license suspension procedures outlined in O.C.G.A. Sections 40-5-55 and 40-5-67.1 and 67.2 hinge upon the commission and subsequent arrest for a crime: violation of O.C.G.A. Section 40-6-391. Only when these two conditions have been met do administrative license suspensions come into play. The basis behind the suspension of petitioner's driver's license in the instant case is identical to the issues that would otherwise be decided at the criminal DUI trial: whether appellant violated O.C.G.A. Section 40-6-391, and whether appellant had a blood alcohol content in excess of 0.10 grams.

4. Punishment v. Remedy: An Examination of Georgia's Administrative License Suspension Scheme:

The State of Georgia has steadfastly contended throughout petitioner's case that the remedial purpose served by O.C.G.A. Section 40-5-67.1, that is,

public safety, far outweigh any punitive intent that may be discerned from Georgia's statutory scheme. The goal of public safety, asserted by the State, is the rapid removal of a dangerous driver from the streets. But Georgia's statutory scheme is entirely devoid of any indication that this is the intent behind the administrative license suspension, other than the brief introductory statement described above in O.C.G.A. Section 40-5-55. O.C.G.A. Section 40-5-67.1(g)(2) specifically limits the scope of an administrative license suspension hearing arising out of a DUI arrest to six issues, all of which address the culpability of the driver, and none of which include any assessment whatsoever of the potential danger to the public posed by the motorist's continued driving. O.C.G.A. Section 40-5-67.1(g)(2).

Any lingering doubt about the punitive intent behind Georgia's license suspension scheme is resolved by reference to O.C.G.A. Section 40-5-67.1(g)(4) which specifically mandates that upon an acquittal or other disposition other than by conviction for DUI, the suspension shall be terminated and deleted from the driver's license record. This feature alone, distinguishes Georgia's administrative license suspension scheme from any of her sister states, in that the disposition of the administrative license suspension is resolved upon disposition of the underlying DUI case leading to the suspension. Not only does this particular feature gut the State's contention that public safety is the driving force behind the immediate license suspension, but it also leads to the inevitable conclusion that the Georgia State Legislature completely intended that the administrative license suspension be based entirely upon the anticipated criminal conviction of the motorist. In essence, "removal of a dangerous driver from the streets" is of no importance in the event the motorist's guilt is not established in the proper forum. Moreover, by virtue of the fact that O.C.G.A. Section 40-5-67.2(b) specifies that the period of an administratively imposed license suspension shall be counted towards any post conviction suspension imposed in a DUI case, any contention of the remedial intent behind Georgia's administrative license suspension scheme is further gutted by the fact that if the streets are made safer more quickly, they are not made safer for any longer period of time than if the State had waited for a conviction, i.e., the motorist will be back out on the street more quickly.

Each of these statutory factors establish the following: (1) That a post-conviction suspension in Georgia unquestionably constitutes punishment, as it can be imposed as part of a subsequent DUI sentence; (2) any post-conviction suspension imposed in the State of Georgia is no different from any suspension arising out of an administrative license

suspension proceeding; (3) that the statutory intertwining of these two suspension periods under O.C.G.A. Section 40-5-67.1(g)(4) and 40-5-67.2(b) leads to the inescapable conclusion that an administrative license suspension constitutes as much of a penalty and punishment as a suspension imposed as a result of a DUI conviction.

5. CONCLUSION:

In the instant case, there is little dispute that the immediate suspension of petitioner's driver's license, based on his arrest for DUI, constitutes a punishment, whether one chooses to examine Georgia's administrative license suspension scheme on its face, or through the standards enunciated by this Court in Halper, Austin and Kurth Ranch. These three cases do not require petitioner to exclude the possibility that a statute may be remedial in order to conclude that it constitutes punishment, but even so, no remedial purpose of any kind can be discerned by scrutinizing O.C.G.A. Section 40-5-67.1, the basis of petitioner's license suspension. The factors considered at an administrative license suspension hearing in Georgia focus entirely on the culpability of the motorist and with no inquiry whatsoever into the danger posed by the motorist in his continued driving and the punitive aspect of a post-conviction license suspension is so inextricably intertwined with any pre-prosecution administrative license suspension that it strains the statute to conclude that it serves a primarily remedial purpose.

Additionally, it is also clear that the administrative license suspension procedure specified by O.C.G.A. Section 40-5-67.1 constitutes a separate proceeding wholly distinct from any prosecution on the DUI charge to be faced by petitioner. The State of Georgia, the prosecuting sovereign in both instances, has enacted two wholly separate rules of procedure governing the administrative license suspension and the DUI prosecution, although the issues to be decided in both are virtually identical. Yet the penalty which may be imposed in both cases, the forfeiture of a motorist's liberty interest in operating a motor vehicle, is the same. In short, petitioner would assert that Georgia's administrative license suspension scheme and the subsequent DUI prosecution based on the same conduct constitute the precise situation in which the double jeopardy analyses established by this Court in Halper, Austin, and Kurth Ranch should apply.

Petitioner does not deny the existence of considerable public pressure nationwide to combat the problems caused by motorists operating under the influence of alcohol. But the prosecuting agencies across the

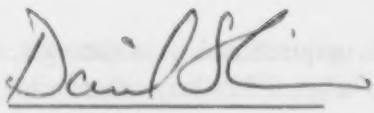
nation, and unquestionably in Georgia, also cannot lose sight of the fact that DUI is a crime like any other crime, and that a motorist charged with such a crime is entitled, like every other citizen, to minimum constitutional protections, including the very basic right to be free from double jeopardy. Simply because a crime happens to be for DUI does not mean that the rights of those so charged should be any less vociferously safeguarded, or that a motorist so charged should not be entitled to the same constitutional protections enunciated by this Court in Halper, Austin and Kurth Ranch.

The rapid proliferation of statutory license suspensions schemes across the country certainly implicates the very basic constitutional right to be free from double jeopardy, and at the moment, little attention is being given to these rights. If these license suspension schemes are indeed premised on the goal of public safety, the question of public safety is one that should be directly raised in an administrative license suspension proceeding, rather than being used as an unsubstantiated rationale to imposed multiple punishments for a single offense, as appears to be the case in Georgia. Until this Court defines the range of constitutional protections to which a motorist charged with DUI is entitled, public pressure will continue to erode those protections. Ultimately, petitioner would assert that the founding fathers drafted the United Constitution to prevent such public pressure from washing away rights of an accused in a DUI prosecution, and it is now up to this Court to staunch this flow, lest the rights of an accused motorist be completely cast adrift. For the above and foregoing reasons, petitioner would therefore respectfully request that this Court GRANT his petition for certiorari, that petitioner be permitted to argue his case before the Court and the courts of the State of Georgia be required to assess petitioner's claim of double jeopardy under the standards previously set forth by this Court.

Respectfully submitted this 25 day of April, 1996.

Bruce F. Morriss

Bruce F. Morriss
Attorney for Petitioner
Georgia Bar No. 525303



Daniel Shim
Attorney for Petitioner
Georgia Bar No. 642749

BRUCE F. MORRISS, P.C.
Suite 200
175 Trinity Avenue
Atlanta, Georgia 30303
(404) 525-8000

## I. APPENDIX:

**DEPARTMENT OF PUBLIC SAFETY**
**DRIVER IMPROVEMENT SECTION - HEARING UNIT**
**P. O. BOX 1456**
**ATLANTA, GEORGIA 30371-2303**

August 15, 1994

CHRISTOPHER PAUL NOLAN
4498 BUFORD HWY. LOT 237
NORCROSS, GA. 30071

RE: IMPLIED CONSENT
SUSPENSION OF 99-99-99
DL#: 030229895
DOB: 12-19-71

**YOU ARE HEREBY OFFICIALLY NOTIFIED** by the Department of Public Safety that your driver's license will not be suspended under the Administrative License Suspension Law and that the suspension under said law is hereby withdrawn.

However your license may be suspended based upon the court's decision on your "Driving Under The Influence" charge.

Sincerely,

Captain R. D. Harper
Hearing Unit
Driver Improvement Section

WFR/gp

cc: BRUCE F. MORRISS, ATTY.
SUITE 200, 175 TRINITY AVE.
ATLANTA, GA. 30303

THE COURT: Okay. All right. Based on what I have here before me, I'm reviewing the notice from the State of Georgia, Department of Public Safety, Driver Improvement Section Hearing Unit. And that was Defendant's No. 2. The order does not contain a finding of fact, nor does it contain conclusions of law.

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It merely states, "Your driver's license will not be suspended under the Administrative License Suspension Law and that the suspension under said law is hereby withdrawn." And it, furthermore, puts the defendant on notice that, "License may be suspended based upon the Court's decision on your 'Driving Under The Influence' charge." I furthermore find that that particular order was generated under the auspices of 40-5-67.1 and was done by a state agency, an executive branch of government.

I furthermore find that there was no notice whatsoever given to the State of Georgia or the prosecuting attorney in this particular charge connected with that. The only nexus whatsoever was that of the arresting officer who happened to be merely a witness apparently for both the implied consent hearing, which was previously held, and now is subpoenaed as a witness on behalf of the State here. The officer is not a prosecutor. The officer is a witness.

I furthermore find that there is a -- that the State does -- and when I say State, I mean the administrative agency -- certainly does have a valid remedial purpose in addressing violations connected with driver's licenses here in the State of Georgia, be that driver's license be point accumulation, failure to renew a permit, or committing other acts which may or may not be criminal in nature; and they have the right to validly address that. I find that these are



completely different branches of government. There's not a nexus of precise issues to be adjudicated.

I do not find that as a matter of law that the defendant has made out a valid basis for a double jeopardy bar. Therefore, the defendant's motion is denied.

Ms. Szabo, do you want to prepare an order or not? I tried to at least briefly ruminate as to what my rationale and reasoning were. I don't pretend to have included all of them because y'all covered so very many excellent points. So the final order will be just motion denied.

MS. SZABO: I'll make a simple order and submit it to the court.

THE COURT: And that's how I'll handle that. Now, if y'all insist on something more involved, I'll gladly entertain that; but you know what I've heard and what I've said. And that's entirely up to you two.

MR. MORRISS: And we have a record.

THE COURT: All right. That will be fine.

MS. SZABO: Thank you.

THE COURT: Okay. Counsel, do you want to come forward and get your copies back?

MR. MORRISS: Thank you, your Honor. I'd like to put on the record also that at this time the defendant would -- I don't have a notice of appeal, direct appeal, prepared; but I'd like to indicate to the Court --



THE COURT: On a double jeopardy, is it notice of direct appeal or certificate?

MS. SZABO: No. It's direct appeal --

THE COURT: Okay.

MS. SZABO: -- unless we're alleging that it's frivolous and done for the purpose of delay, but we're not alleging that.

THE COURT: All right. Sounds like an excellent point, folks.

MR. MORRISS: Thank you, your Honor.

THE COURT: Mr. Morriss, you did a good job in presenting it.

(Proceedings concluded.)

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**IN THE STATE COURT OF GWINNETT COUNTY**
**STATE OF GEORGIA**

**State of Georgia**

**v.** **Accusation No. 94D-2463-2**

**Christopher P. Nolen**

**ORDER**

The above styled case having come on to be heard the 22nd day March, 1995 upon the **DEFENDANT'S MOTION FOR DISCHARGE AND ACQUITTAL BASED UPON DOUBLE JEOPARDY** and after hearing evidence and argument of the parties;

**IT IS HEREBY ORDERED** that same said Motion is **DENIED.**

This 22nd day of March, 1995.

_____
Judge Warren Davis
State Court of Gwinnett County,
by designation

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a copy of the foregoing **ORDER** upon opposing counsel by depositing a copy in the U.S. Mail with adequate postage affixed to assure delivery and addressed as follows:

Bruce F. Morriss
200 Peachtree-Trinity Building
175 Trinity Avenue, S.W.
Atlanta, Georgia 30303

Done this 22nd day of March 1995.

_____
Rosanna M. Szabo
Assistant Solicitor
Bar No. 532490

**WHOLE COURT**

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISIONS to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

October 2, 1995

In the Court of Appeals of Georgia

A95A1570. NOLEN v. THE STATE.

A95A1727. MOORE v. THE STATE.

ANDREWS, Judge.

Both of these appeals concern similar claims that double jeopardy bars a subsequent criminal prosecution for the offense of driving under the influence (DUI) after an administrative license suspension hearing. [1] In case number A95A1570, Nolen claims that an administrative driver's license suspension hearing constitutes a prosecution that bars any subsequent criminal prosecution on DUI charges based on the double jeopardy prohibition against multiple prosecutions for the same offense. In case number A95A1727, Moore claims that a driver's license suspension at an administrative hearing constitutes punishment, and therefore bars a subsequent criminal prosecution on DUI charges, based on the double jeopardy prohibition against multiple punishments. We hold in both cases

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1 These two cases are being decided by the whole court pursuant to OCGA Section 15-3-1 (c) (2) & (3).

that double jeopardy does not bar the subsequent criminal prosecution or punishment.

The facts in case number A95A1570 show that Nolen was arrested for DUI on May 28, 1994 and was issued an "Official Notice of Intent to Suspend License." He requested and received an administrative implied consent hearing pursuant to OCGA Section 40-5-67.1 to determine whether the driver's license suspension should be sustained or rescinded. The hearing was held by the Department of Public Safety and was presided over by an administrative law judge (ALJ). At the hearing, the ALJ rescinded the license suspension. (Nothing in the record indicates why the ALJ rescinded the suspension, i.e., lack of reasonable grounds, officer failed to adequately inform of implied consent laws, etc.) Nolen then made a motion for discharge and acquittal on the DUI charge on the theory that a criminal prosecution for violation of OCGA Section 40-6-391 would violate federal and state double jeopardy provisions because it would constitute a second prosecution for the same offense. His appeal is from the denial of the motion.

In case number A95A1727, Moore was arrested for failure to maintain lane, driving under the influence of alcohol or drugs, and driving with an illegal blood alcohol level. Moore submitted to a breathalyzer test and her blood alcohol concentration registered at 0.13 grams. Pursuant to

OCGA Section 40-5-67.1, the Georgia Department of Public Safety notified Moore that her license would be suspended due to her blood alcohol concentration of 0.10 grams or more. Moore requested and received a hearing on the license suspension at which her driver's license was suspended for a minimum of three years. Moore subsequently moved for dismissal of the criminal charges claiming that federal double jeopardy provisions barred multiple punishment for the same offense. She appeals from the denial of the motion.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Georgia Constitution also contains a double jeopardy clause which provides that "[n]o person shall be put in jeopardy of life or liberty more than once for the same offense." Ga. Const., 1983, Art. I, Sec. I, Par. XVIII. Further, OCGA Sections 16-1-6, 16-1-7, and 16-1-8 also provide limitations on multiple prosecutions, convictions, and punishments for the same criminal conduct. Stone v. State, 166 Ga. App. 245 (304 SE2d 94) (1983).

Double jeopardy protects against three types of abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711,

717 (89 SC 2072, 2076, 23 LE2d 656, 664-65) (1969). Nolen contends that the administrative license suspension hearing involved the same conduct and the same issues as would a criminal prosecution on DUI charges, and therefore such prosecution is barred by the double jeopardy prohibition against multiple prosecutions. Moore contends that a criminal prosecution against her on the DUI charges would amount to an attempt by the state to punish her a second time for the same offense and would therefore violate the double jeopardy prohibition against multiple punishments.

Traditionally, an administrative hearing could not constitute a prosecution for the purpose of double jeopardy analysis because it was not a criminal proceeding (Alexander v. State, 129 Ga. App. 395, 397-398 (199 SE2d 918) (1973), nor have administrative sanctions been considered punishment for the purposes of double jeopardy. Coates v. Seay, 239 Ga. 635 (238 SE2d 422) (1977); Middlebrook v. Allen, 234 Ga. 481, 482 (216 SE2d 331) (1975). However, recent United States Supreme Court decisions recognize that an administrative proceeding may invoke double jeopardy protections. Montana Department of Revenue v. Kurth Ranch, 511 U.S. ___, (114 SC 1937, 128 LE2d 767) (1994); United States v. Halper, 490 U.S. 435 (109 SC 1892, 104 LE2d 487) (1989). An administrative sanction may constitute punishment for the purposes of double jeopardy if the purpose of the sanction is not remedial, but instead serves the goals of

retribution or deterrence. Kurth Ranch, supra; Halper, supra. In Kurth Ranch, supra, the Supreme Court held that a civil proceeding imposing an excessive tax on defendants for possession of illegal drugs after they were convicted on criminal drug charges constituted the "functional equivalent of a successive criminal prosecution" that placed defendants "in jeopardy a second time for the same offense." Kurth Ranch, supra, 128 LE2d at 782. Thus, circumstances may arise in which an administrative hearing constitutes a prosecution for double jeopardy purposes and thus bars any subsequent criminal prosecution based on the same issues and conduct.

To determine whether a civil proceeding constitutes a prosecution for the purposes of double jeopardy, the potential sanction involved must be penal rather than remedial. That is, it must serve to punish the defendant. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." Halper, supra, 104 LE2d at 502. However, the decision in Halper does not mandate that a civil sanction that incidentally serves a punishment purpose constitutes punishment for double jeopardy purposes. As the Supreme Court acknowledged in Halper, supra, from the defendant's perspective "even remedial sanctions carry the sting of punishment." Halper, supra, 104 LE2d at 501 n.7. "This [,however,] is not to say that whether a sanction constitutes punishment must be determined

from the defendant's perspective." Id. The Georgia Supreme Court has held that "[t]he fact that a statute designed primarily of punishment as well does not mean that the statute results in punishment for double jeopardy purposes." Moser v. Richmond Co. Bd. of Comm., 263 Ga. 63, 64 (428 SE2d 71) (1993) (punctuation and citation omitted). In Moser, the court established a list of factors to consider in determining whether a civil sanction is punishment for double jeopardy purposes. "Among the factors to consider are whether the sanction involves an affirmative disability or restraint, has been regarded historically as punishment, requires a finding of scienter, promotes retribution and deterrence as the goals of punishment, is rationally connected to an alternative purpose, and appears excessive when compared to the alternative purpose." Moser, supra at 64. Applying these factors, we conclude that the administrative license suspension hearing does not involve punishment for double jeopardy purposes.

While the suspension of a driver's license may arguably be characterized as an affirmative restraint, it does not require a finding of scienter, and "it is actually the revocation of a privilege voluntarily granted, a traditional attribute of a remedial action." Moser, 263 Ga. at 64 (punctuation and citation omitted); Nelson v. State, 87 Ga. App. 644, 648 (75 SE2d 39) (1953); OCGA Sections 40-1-1 (24) (B); 40-5-1 (16), (17). Moreover, the purpose of the license suspension hearing is clearly remedial.

"The State of Georgia considers dangerous and negligent drivers to be a direct and immediate threat to the welfare and safety of the general public, and it is in the best interests of the citizens of Georgia immediately to remove such drivers from the highways of this state." OCGA Section 40-5-57. There can be no doubt that drivers with a blood alcohol level in excess of 0.10 grams pose a "direct and immediate threat to the welfare and safety of the general public." OCGA Section 40-5-55. The purpose of the driver's license suspension hearing is to provide a quick, informal procedure to remove dangerous drivers from Georgia's roadways and thereby protect public safety. The motorist is not jailed fined as a result of the suspension, but merely temporarily loses the privilege of driving on Georgia's highways. An administrative suspension of a driver's license is not comparable to the civil forfeiture of a property right, which has been found to constitute punishment. United States v. $405,089.23, 33 F3d 1210 (1994). In Georgia, a driver's license is not an absolute right, but rather is a privilege that may be revoked for cause. "[T]he right to continue the operation and to keep the license to drive is dependent upon the manner in which the licensee exercises this right. The right is not absolute, but is a privilege . . . while it cannot be revoked without reason, it can be constitutionally revoked or suspended for any cause having to do with public safety." Nelson, supra at 648. Because the purpose of the administrative license suspension is to

protect public safety, and the deterrent effect is only incidental, we find that the sanction is clearly remedial.

Accordingly, the suspension of a driver's license at an administrative hearing is not punishment, nor is the hearing a prosecution, for the purposes of double jeopardy. We find no error in the denial of Nolen's motion for discharge and acquittal on the basis of double jeopardy in case number A95A1570, and no error in the denial of Moore's motion to dismiss on the basis of double jeopardy in case number A95A1727.

Judgments affirmed. Beasley, C. J., McMurray, P. J., Birdsong, P. J., Johnson, Blackburn, Smith and Ruffin, JJ., concur.

**Court of Appeals**

**of the State of Georgia**

**ATLANTA, OCTOBER 26, 1995**

***The Honorable Court of Appeals met pursuant to adjournment.***

***The Following order was passed:***

Case No. A95A1570

CHRISTOPHER P. NOLEN V. THE STATE

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

*Court of Appeals of the State of Georgia*

*Clerk's Office, Atlanta*

*I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court hereto affixed the day and year last above written.*

*Clerk.*

**SUPREME COURT OF THE STATE OF GEORGIA**

**CLERK'S OFFICE**

**ATLANTA**

DATE: January 26, 1996

Bruce F. Morriss
BRUCE F. MORRISS, P.C.
175 Trinity Ave.
Suite 200
Atlanta, GA 30303

Case No. S96CO288

CHRISTOPHER PAUL NOLEN V. THE STATE

COURT OF APPEALS CASE NO. A95A1570

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

## CONSTITUTION OF THE UNITED STATES OF AMERICA

### [AMENDMENT V]

### [Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

# CONSTITUTION OF THE STATE OF GEORGIA

## Article I, Section I, Paragraph XVIII

### Jeopardy of life or liberty more than once forbidden

No person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial.

**Section 408. Alcohol traffic safety programs**

**(a)** Subject to the provisions of this section, the Secretary shall make grants to those States which adopt and implement effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol or a controlled substance. Such grants may only be used by recipient States to implement and enforce such programs.

**(b)** No grant may be made to a State under this Section in any fiscal year unless such State enters into such agreements with the Secretary as the Secretary may require to ensure that such State will maintain its aggregate expenditures from all other sources for alcohol traffic safety programs at or above the average level of such expenditures in its two fiscal years preceding the date of enactment of this section.

**(c)** No State may receive grants under this section in more than 5 fiscal years. The Federal share payable for any grant under this section shall not exceed---

**(1)** in the first fiscal year the State receives a grant under this section, 75 per centum of the cost of implementing and enforcing in such fiscal year the alcohol and controlled substance traffic safety program adopted by the State pursuant to subsection (a);

**(2)** in the second fiscal year the State receives a grant under this section, 50 per centum or the cost of implementing and enforcing in such fiscal year such program; and

**(3)** in the third, fourth, and fifth fiscal years the State receives a grant under this section, 25 per centum of the cost of implementing and enforcing in such fiscal year such program.

**(d)(1)** Subject to subsection (c), the amount of a basic grant made under this section for any fiscal year to any State which is eligible for such a grant under subsection (e)(1) shall equal 30 per centum of the amount apportioned to such State for fiscal year 1983 under section 402 of this title.

**(2)** Subject to subsection (c), the amount of a supplemental grant made under this section for any fiscal year to any State which is eligible for such a grant under subsection (e)(2) shall not exceed 20 per centum of the

amount apportioned to such State for fiscal year 1983 under section 402 of this title. Such supplemental grant shall be in addition to any basic grant received by such State.

(3) Subject to subsection (c), the amount of a special grant made under this section for any fiscal year to any State which is eligible for such a grant under subsection (e)(3) shall not exceed 5 per centum of the amount apportioned to such State for fiscal year 1984 under sections 402 and 408 of this title. Such grant shall be in addition to any basic or supplemental grant received by such State.

(e)(1) For purposes of this section, a State is eligible for a basic grant if such State provides—

(A) for the prompt suspension, for a period not less than ninety days in the case of a first offender and not less than one year in the case of any repeat offender, of the driver's license of any individual who a law enforcement officer has probable cause under State law to believe has committed an alcohol-related traffic offense, and (i) to whom is administered one or more chemical tests to determine whether the individual was intoxicated while operating the motor vehicle and who is determined, as a result of such tests, to be intoxicated, or (ii) who refuses to submit to such a test as proposed by the officer;

(B) for a mandatory sentence, which shall not be subject to suspension or probation, of (i) imprisonment for not less than forty-eight consecutive hours, or (ii) not less than ten days of community service, of any person convicted of driving while intoxicated more than once in any five year period;

(C) that any person with a blood alcohol concentration of 0.10 percent or greater when driving a motor vehicle shall be deemed to be driving while intoxicated; and

(D) for increased efforts or resources dedicated to the enforcement of alcohol-related traffic laws and increased efforts to inform the public of such enforcement.

(2) For purposes of this section, a State is eligible for a supplemental grant if such State is eligible for a basic grant and in addition provides for some or all of the criteria established by the Secretary under subsection (f).

(3) For the purposes of this section, a State if eligible for a special grant if the State enacts a statute which provides that—

(A) any person convicted of a first violation of driving under the influence of alcohol shall receive—

(I) a mandatory license suspension for a period of not less than ninety days; and either

(ii)(I) an assignment of one hundred hours of community service; or

(II) a minimum sentence of imprisonment for forty-eight consecutive hours;

(B) any person convicted of a second violation of driving under the influence of alcohol within five years after a conviction for the same offense, shall receive a mandatory minimum sentence of imprisonment for ten days and license revocation for not less than one year;

(C) any person convicted of a third or subsequent violation of driving under the influence of alcohol within five years after a prior conviction for the same offense shall—

(i) receive a mandatory minimum sentence of imprisonment for one hundred twenty days; and

(ii) have his license revoked for not less than three years; and

(D) any person convicted of driving with a suspended or revoked license or in violation of a restriction due to driving under the influence of alcohol conviction shall receive a mandatory sentence of imprisonment for at least thirty days, and shall upon release from imprisonment, receive an additional period of license suspension or revocation of not less than the period of suspension or revocation remaining in effect at the time of commission of the offense of driving with a suspended or revoked license.

(f) the Secretary shall, by rule, establish criteria for effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol, which criteria shall be in addition to those required for a basic grant under subsection (e)(1). The Secretary shall

establish such criteria in cooperation with the States and political subdivisions thereof, appropriate Federal departments and agencies, and such other public and nonprofit organization as the Secretary may deem appropriate. Such criteria may include, but need not be limited to, requirements---

(1) for the establishment and maintenance of a statewide driver recordkeeping system from which repeat offenders may be identified and which is accessible in a prompt and timely manner to the courts and to the public;

(2) for the creation and operation of rehabilitation and treatment programs for those arrested and convicted of driving while intoxicated;

(3) for the impoundment of any vehicle operated on a State road by any individual whose driver's license is suspended or revoked for an alcohol-related driving offense;

(4) for the establishment in each major political subdivision of a State of locally coordinated alcohol traffic safety programs which are administered by local officials and are financially self-sufficient;

(5) for the grant or presentence screening authority to the courts;

(6) for the setting of minimum drinking age in such State at twenty-one years of age;

(7) for the consideration of and, where consistent with other provisions of State law and constitution the adoption of, recommendations that the Presidential Commission on Drunk Driving may issue during the period in which rules are being made to carry out this section; and

(8) for the creation and operation of rehabilitation and treatment programs for those arrested and convicted of driving while under the influence of a controlled substance or for the establishment or research programs to develop effective means of detecting use of controlled substances by drivers.

(g) There is hereby authorized to be appropriated to carry out this section, out of the Highway Trust Fund, $25 000,000 for the fiscal year ending September 30, 1983, and $50,000,000 per fiscal year for each of

the fiscal years ending September 30, 1984, and September 30, 1985. All provisions of chapter 1 of this title that are applicable to Federal-aid primary highway funds, other than provisions relating to the apportionment formula and provisions limiting the expenditures of such funds to Federal-aid systems, shall apply to the funds authorized to be appropriated to carry out this section, except as determined by the Secretary to be inconsistent with this action and except that sums authorized by this subsection shall remain available until expended. Sums authorized by this subsection shall not be subject to any obligation limitation for Sate and community highway safety programs.

**Section 410. Drunk driving prevention programs**

**(a) General authority.**—Subject to the provisions of this section and the extent provided in advance in appropriation Acts, the Secretary shall make basic and supplemental grants to those States which adopt and implement drunk driving prevention programs which include measures described in this section to improve the effectiveness of the enforcement of laws the purpose of which are to discourage individuals from operating motor vehicles while under the influence of alcohol. Such grants may only be used by recipient States to implement and enforce such programs.

**(b) Maintenance of effort.**—No grant may be made to a State under this section in any fiscal year unless such State enters into such agreements with the Secretary as the Secretary may require to ensure that such State will maintain its aggregate expenditures from all other sources for drunk driving prevention programs at or above the average level of such expenditures in its 2 fiscal years preceding the date of enactment of this section.

**(c) Federal share.**—No State may receive grants under this section in more than 3 fiscal years. The Federal share payable for any grant under this section shall not exceed—

(1) in the first fiscal year a State receives a grant under this section, 75 percent of the cost of implementing and enforcing in such fiscal year the drunk driving prevention program adopted by the State pursuant to subsection (a) of this section;

(2) in the second fiscal year the State receives a grant under this section, 50 percent of the cost of implementing and enforcing in such fiscal year such program; and

(3) in the third fiscal year the State receives a grant under this section, 25 percent of the cost of implementing and enforcing in such fiscal year such program.

**(d) Maximum amount of basic grants.**—Subject to subsection (c) of this section, the amount of a basic grant made under this section for any fiscal year to any State which is eligible for such a grant under subsection (e) of this section shall not exceed 30 percent of the amount apportioned to such State for fiscal year 1989 under section 402 of this title.

**(e) Eligibility for basic grants.**---For purposes of this section, a State is eligible for a basic grant if such State provides—

(1) for an expedited driver's license suspension or revocation system for individuals who operate motor vehicles while under the influence of alcohol which requires that—

(A) when a law enforcement officer has probable cause under State law to believe an individual has committed an alcohol-related traffic offense and such individual is determined, on the basis of a chemical test, to have been under the influence of alcohol while operating the motor vehicle or refuses to submit to such a test as proposed by the officer, the officer serve such individual with a written notice of suspension or revocation of the driver's license of such individual and take possession of such driver's license;

(B) the notice of suspension or revocation referred to in subparagraph (A) provide information on the administrative procedures under which the State may suspend or revoke in accordance with the objectives of this section a driver's license of an individual for operating a motor vehicle while under the influence of alcohol and specify any rights of the operator under such procedures;

(C) the State provide, in the administrative procedures referred to in subparagraph (B), for due process of law, including the right to an administrative review of a driver's license suspension or revocation within the time period specified in subparagraph (F);

(D) after serving notice and taking possession of a driver's license in accordance with subparagraph (A), the law enforcement officer immediately report to the State entity responsible for administering drivers' licenses all information relevant to the action taken in accordance with this paragraph;

(E) in the case of an individual who, in any 5-year period beginning after the date of the enactment of this section, is determined on the basis of a chemical test to have been operating a motor vehicle under the influence of alcohol or is determined to have refused to submit to such a test as proposed by the law enforcement officer, the State entity responsible for

administering drivers' licenses, upon receipt of the report of the law enforcement officer—

(i) suspend the driver's license of such individual for a period of not less than 90 days if such individual is a first offender in such 5-year period; and

(ii) suspend the driver's license of such individual for a period of not less than 1 year, or revoke such license, if such individual is a repeat offender in such 5-year period; and

(F) the suspension and revocation referred to under subparagraph (D) take effect not later than—

(i) 15 days after the day on which the individual first received notice of the suspension or revocation in accordance with subparagraph (B); or

(ii) 30 days after the day on which the individual first received notice of the suspension or revocation in accordance with subparagraph (B) if the Secretary determines that the requirements of clause (i) would impose a hardship upon the State; and

(2) for a self-sustaining drunk driving prevention program under which the fines or surcharges collected from individuals convicted of operating a motor vehicle while under the influence of alcohol are returned, or an equivalent amount of non-Federal funds are provided, to those communities which have comprehensive programs for the prevention of such operations of motor vehicle.

(f) **Supplemental grant programs.**—

(1) **Mandatory blood alcohol concentration testing programs.**—For purposes of this section, a State is eligible for a supplemental grant for a fiscal year in an amount, subject to subsection (c) of this section, not to exceed 10 percent of the amount apportioned to such State for fiscal year 1989 under section 402 of this title if such State is eligible for a basic grant and in addition such State provides for mandatory blood alcohol concentration testing whenever a law enforcement officer has probable cause under State law to believe that a driver of a motor vehicle involved in an accident resulting in the loss of human life or, as determined by the

Secretary, serious bodily injury, has committed an alcohol-related traffic offense.

**(2) Program for prevention of operators under age 21 from obtaining alcoholic beverages.**—For purposes of this section, a State is eligible for a supplemental grant for a fiscal year in an amount, subject to subsection (c) of this section, not to exceed 10 percent of the amount apportioned to such State for fiscal year 1989 under section 402 of this title if such State is eligible for a basic grant and in addition such State provides for an effective system for preventing operators of motor vehicles under age 21 from obtaining alcoholic beverages, which may include the issuance of drivers' licenses to individuals under age 21 that are easily distinguishable in appearance from drivers' licenses issued to individuals 21 years of age or older.

**(3) Unlawful open container and consumption of alcohol programs.**--For purposes of this section, a State is eligible for a supplemental grant for a fiscal year in an amount, subject to subsection (c) of this section, not to exceed 25 percent of the amount apportioned to such State for fiscal year 1989 under section 402 of this title if such State is eligible for a basic grant and in addition such State makes unlawful the possession of any open alcoholic beverage container, or the consumption of any alcoholic beverage, in the passenger area of any motor vehicle located on a public highway or the right-of-way of a public highway, except—

(A) as allowed in the passenger area, by persons (other than the driver), of any motor vehicle designed to transport more than 10 passengers (including the driver) while being used to provide charter transportation of passengers; or

(B) as otherwise specifically allowed by such State, with the approval of the Secretary, but in no event may the driver of such motor vehicle be allowed to possess or consume an alcoholic beverage in the passenger area.

**(4) Suspension of registration and return of license plate program.**--For purposes of this section, a State is eligible for a supplemental grant for a fiscal year in an amount, subject to subsection (c) of this section, not to exceed 10 percent of the amount apportioned to such State for fiscal year 1989 under section 402 of this title if such State is eligible for a basic grant and in addition such State provides for the suspension of the

registration of, and the return to such State of the license plates for, any motor vehicle owned by an individual who—

(A) has been convicted on more than 1 occasion of an alcohol-related traffic offense within any 5-year period after the date of the enactment of this section; or

(B) has been convicted of driving while his or her driver's license is suspended or revoked by reason of a conviction for such an offense.

A State may provide limited exceptions to such suspension of registration or return of license plates, on an individual basis, to avoid undue hardship to any individual, including any family member of the convicted individual, and any co-owner of the motor vehicle, who is completely dependent on the motor vehicle for the necessities of life. Such exceptions may not result in unrestricted reinstatement of the registration or unrestricted return of the license plates of the motor vehicle.

(5) **Grants as being in addition to other grants.**—A supplemental grant under this section shall be in addition to any basic grant or any other supplemental grant received by such State.

(g) **Definitions.**—As used in this section—

(1) **Alcoholic beverage.**—The term "alcoholic beverage" has the meaning such term has under section 158(c) of this title.

(2) **Motor vehicle.**—The term "motor vehicle" has the meaning such term has under section 154(b) of this title.

(3) **Open alcoholic beverage container.**—The term "open alcoholic beverage container" means any bottle, can or other receptacle—

(A) which contains any amount of an alcoholic beverage; and
(B)(i) which is open or has a broken seal, or
(ii) the contents of which are partially removed.

(h) **Authorizations of appropriations.**—There is authorized to be appropriated to carry out this section $25,000,000 for fiscal year 1989 and $50,000,000 per fiscal year for each of fiscal years 1990 and 1991. Such sums shall remain available until expended.

**40-5-55. Implied consent to chemical tests.**

(a) The State of Georgia considers that the persons who are under the influence of alcohol or drugs while operating a motor vehicle or who have a blood alcohol concentration of 0.10 grams or more at any time within three hours after operating a motor vehicle from alcohol consumed before such driving or actual physical control ended or who have any amount of marijuana or any controlled substance without prescription present in their blood or urine, without regard to the presence of alcohol, while operating a motor vehicle constitute a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 or if such person is involved in any traffic accident resulting in serious injuries or fatalities. The test or tests shall be administered at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Code Section 40-6-391. The test or tests shall be administered as soon as possible to any person who operates a motor vehicle upon the highways or elsewhere throughout this state who is involved in any traffic accident resulting in serious injuries or fatalities. Subject to Code Section 40-6-392, the requesting law enforcement officer shall designate which of the test or tests shall be administered provided a blood test with drug screen may be administered to any person operating a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this Code section, and the test or tests may be administered, subject to Code Section 40-6-392.

(c) As used in this Code section, the term "traffic accident resulting in serious injuries or fatalities" means any motor vehicle accident in which a person was killed or in which one or more persons suffered a fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness. (Ga. L. 1968, p. 448, Section 2;

Ga. L. 1974, p. 562, Section 2; Ga. L. 1974, p. 633, Section 3; Code 1933, Section 68B-306, enacted by Ga. L. 1975, p. 1008, Section 1; Ga. L. 1983, p. 1000, Section 3; Ga. L. 1985, p. 630, Section 1; Ga. L. 1985, p. 758, Section 2; Ga. L. 1987, p. 1489, Section 1; Ga. L. 1989, p. 1698, Section 1; Ga. L. 1990, p. 2048, Section 4; Ga. L. 1991, p. 1886, Section 2; Ga. L. 1992, p. 912, Section 1; Ga. L. 1992, p. 2564, Section 1; Ga. L. 1993, p. 940, Section 2.)

**40-5-67. Seizure and disposition of driver's license of persons charged with driving under the influence; issuance of temporary driving permit; disposition of case.**

(a) Whenever any resident or nonresident person is charged with violating Code Section 40-6-391, the law enforcement officer shall take the driver's license of the person so charged. The driver's license shall be attached to the court's copy of the uniform traffic citation and complaint form and shall be forwarded to the court having jurisdiction of the offense. A copy of the uniform traffic citation and complaint form shall be forwarded, within ten days of issue, to the Department of Public Safety. Taking the driver's license as required in this Code section shall not prohibit any law enforcement officer or agency from requiring any cash bond authorized by Article 1 of Chapter 6 of Title 17.

(b) At the time the law enforcement officer takes the driver's license, he shall issue a temporary driving permit to the person as follows:

(1) If the driver refuses to submit to a test or tests to determine the presence of alcohol or drugs as required by Code Section 40-5-55, the officer shall issue a 20 day temporary driving permit;

(2) If the driver's license is required to be suspended under Code Section 40-5-67.1, the officer shall issue a 20 day temporary driving permit; or

(3) If the test or tests administered pursuant to Code Section 40-5-55 indicate a blood alcohol concentration in violation of Code Section 40-6-391 but less than the level for an administrative suspension of the license under subsection (c) of Code Section 40-5-67.1, or if the review of the driver's license has not been suspended within the previous five years, as measured from the dates of previous arrests for which a suspension was obtained to the date of the current arrest, the officer shall issue a 180 day temporary driving permit.

This temporary driving permit shall be valid for the stated period or until the person's driving privilege is suspended or revoked under any provision of this title. The Department of Public Safety, at its sole discretion, may delay the expiration date of the temporary driving permit, but in no event shall this delay extend beyond the date when such person's driving privilege is suspended or revoked under any provision of this title. The

department shall by rules and regulations establish the conditions under which the expiration of the temporary permit may be delayed.

(c) (1) If the person is convicted of violating Code Section 40-6-391, the court shall, within ten days, forward the person's driver's license and the record of the disposition of the case to the Department of Public Safety. At this time, the court shall also require the person to surrender the temporary driving permit issued pursuant to subsection (b) of this Code section.

(2) If the person is not convicted of violating Code Section 40-6-391, and the court is in possession of the driver's license, the court shall return the driver's license to the person unless the license is in suspension for any other offense, in which case the court shall forward the license to the Department of Public Safety for disposition. (code 1981, Section 40-5-69, enacted by Ga. L. 1983, p. 1000, Section 1; Code 1981, Section 40-5-67, as redesignated by Ga. L. 1990, p. 2048, Section 4; Ga. L. 1992, p. 2564, Section 5; Ga. L. 1994, p. 1600, Section 2.)

**40-5-67.1. Administration of chemical tests; rights of motorists; reporting of test results; refusal to submit; suspension or denial; hearing and review; compensation of officers attending hearings.**

(a) The test or tests required under Code Section 40-5-55 shall be administered as soon as possible at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Code Section 40-6-391 and the officer has arrested such person for a violation of Code Section 40-6-391, any federal law in conformity with Code Section 40-6-391, or any local ordinate which adopts Code Section 40-6-391 by reference or the person has been involved in a traffic accident resulting in serious injuries or fatalities. Subject to Code Section 40-6-392, the requesting law enforcement officer shall designate which test shall be administered, provided that the officer shall require a breath test or a blood test and may require a urine test.

(b) At the time a chemical test or tests are requested, the person shall be informed by the arresting officer that:

(1) Georgia law requires the person to submit to a test to determine if the person is under the influence of alcohol or other drugs;

(2) If the testing is refused, the person's driver's license or right to drive will be suspended for a minimum period of one year;

(3) If a test is performed and the results indicate a blood alcohol concentration in violation of the law, the driver's license or right to drive may be suspended for a minimum period of one year;

(4) After submitting to the required testing, the person shall be entitled to obtain an additional test or tests at the expense of such person; and.

(5) The refusal to submit to a test may be offered into evidence against the person at trial.

Failure to provide any notice required under this subsection shall not invalidate the suspension pursuant to this Code section of any driver's license.

(c) If a person under arrest or a person who was involved in any traffic accident resulting in serious injuries or fatalities submits to a chemical test upon the request of a law enforcement officer and the test results and a review of the driver's prior driving record indicate that a suspension or disqualification is required under this Code section, the results shall be reported to the department, such review of the driver's record shall be completed at the time of such arrest or accident or within the ten-day period prior to submission of the sworn report to the department. Upon the receipt of a sworn report of the law enforcement officer that the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a moving motor vehicle upon the highway or elsewhere throughout this state in violation of Code Section 40-6-391 or that such person had been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state and was involved in a traffic accident involving serious injuries or fatalities and that the person submitted to a chemical test at the request of the law enforcement officer and the test results indicate either a blood alcohol concentration of 0.10 grams or more or, for a person under the age of 18, a blood alcohol concentration of 0.06 grams or more, the department shall suspend the person's driver's license, permit, or nonresident operating privilege pursuant to Code Section 40-5-67.2, subject to review as provided for in this chapter. A person's license shall not be administratively suspended for the first time pursuant to the immediately preceding sentence unless, in addition to any other requirement for that suspension, that person's license has previously been administratively suspended or the person has been convicted of or had a plea of nolo contendere accepted within the previous five years, as measured from the dates of previous arrests for which a suspension was obtained to the date of the current arrest, to a charge of violating any provision of this chapter for which any test may be required under Code Section 40-5-55. Upon the receipt of a sworn report of the law enforcement officer that the arrested person had been operating or was in actual physical control of a moving commercial motor vehicle and the test results indicate a blood alcohol concentration of 0.04 grams or more, the department shall disqualify the person from operating a motor vehicle for a minimum period of one year.

(d) If a person under arrest or a person who was involved in any traffic accident resulting in serious injuries or fatalities refuses, upon the request of a law enforcement officer, to submit to a chemical test designated by the law enforcement officer as provided in subsection (a) of this Code section,

no test shall be given; but the law enforcement officer shall report the refusal to the Department of Public Safety. Upon the receipt of a sworn report of the law enforcement officer that the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Code Section 40-6-391 or that such person had been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state and was involved in a traffic accident which resulted in serious injuries or fatalities and that the person had refused to submit to the test upon the request of the law enforcement officer, the department shall suspend the person's driver's license, permit, or nonresident operating privilege for a period of one year or if the person was operating or in actual physical control of a commercial motor vehicle, the department shall disqualify the person from operating a commercial motor vehicle and shall suspend the person's driver's license, permit, or nonresident operating privilege, subject to review as provided for in this chapter.

(e) If the person is a resident without a driver's license, commercial driver's license, or permit to operate a motor vehicle in this state, the department shall deny issuance of a license or permit to such person for the same period provided in subsection (c) or (d) of this Code section, whichever is applicable, for suspension of a license or permit or disqualification to operate a commercial motor vehicle subject to review as provided for in this chapter.

(f) (1) The law enforcement officer, acting on behalf of the department, shall personally serve the notice of intention to suspend or disqualify the license of the arrested person or other person refusing such test on such person at the time of the person's refusal to submit to a test or at the time at which such a test and review of the driver's prior driving record indicates that suspension or disqualification is required under this Code section. The law enforcement officer shall take possession of any driver's license or permit held by any person whose license is subject to suspension pursuant to subsection (c) or (d) of this Code section, if any, and shall issue a 20 day temporary permit. The officer shall forward the person's driver's license to the department along with the notice of intent to suspend or disqualify and the sworn report required by subsection (c) or (d) of this Code section within ten calendar days after the date of the arrest of such person. This paragraph shall not apply to any person issued a 180 day temporary permit pursuant to subsection (b) of Code Section 40-5-67.

The failure of the officer to transmit the sworn report required by this Code section within ten calendar days shall not prevent the Department of Public Safety from accepting such report and utilizing it in the suspension of a driver's license as provided in this Code section.

(2) If notice has not been given by the arresting officer, the department, upon receipt of the sworn report of such officer, shall suspend the person's driver's license, permit, or nonresident operating privilege or disqualify such person from operating a motor vehicle and, by regular mail, at the last known address, notify such person of such suspension or disqualification. The notice shall inform the person of the grounds of suspension or disqualification, the effective date of the suspension or disqualification, and the right to review. The notice shall be deemed received three days after mailing.

(g) (1) A person whose driver's license is suspended or who is disqualified from operating a commercial motor vehicle pursuant to this Code section shall request, in writing, a hearing within ten business days from the date of personal notice or receipt of notice sent by certified mail, return receipt requested, or the right to said hearing shall be deemed waived. Within 30 days after receiving a written request for a hearing, the department shall hold a hearing as is provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The hearing shall be recorded.

(2) The scope of the hearing shall be limited to the following issues:

(A) Whether the law enforcement officer had reasonable grounds to believe the person was driving or in actual physical control of a moving motor vehicle while under the influence of alcohol or a controlled substance and was lawfully placed under arrest for violating Code Section 40-6-391; or

(B) Whether the person was involved in a motor vehicle accident or collision resulting in serious injury or fatality; and

(C) Whether at the time of the request for the test or tests the officer informed the person of the person's implied consent rights and the consequence of submitting or refusing to submit to such test; and

(D) Whether the person refused the test; or

(E) Whether a test or tests was administered and the results indicated a blood alcohol concentration of 0.10 grams or more or, for a person under the age of 18, a blood alcohol concentration of 0.04 grams or more or, for a person operating or having actual physical control of a commercial motor vehicle, a blood alcohol concentration of 0.04 grams or more; and

(F) Whether the test or tests were properly administered by an individual possessing a valid permit issued by the Division of Forensic Sciences of the Georgia Bureau of Investigation on a machine approved by the Division of Forensic Sciences or a test conducted by the Division of Forensic Sciences, including whether the machine at the time of the test was operated with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order, which shall be required. A copy of the operator's permit showing that the operator has been trained on the particular type of machine used and one of the original copies of the test results or, where the test is performed by the Division of Forensic Sciences, a copy of the crime lab report shall satisfy the requirements of this subparagraph.

(3) The hearing officer shall, within five calendar days after such hearing, forward a decision to the department to rescind or sustain the driver's license suspension or disqualification. If no hearing is requested within the ten business days specified above, and the failure to request such hearing is due in whole or in part to the reasonably avoidable fault of the person, the right to a hearing shall have been waived. The request for a hearing shall not stay the suspension of the driver's license; provided, however, that if the hearing is timely requested and is not held before the expiration of the temporary permit and the delay is not due in whole or in part to the reasonably avoidable fault of the person, the suspension shall be stayed until such time as the hearing is held and the hearing officer's decision is made.

(4) In the event the person is acquitted of a violation of Code Section 40-6-391 or such charge is initially disposed of other than by a conviction, then the suspension shall be terminated and deleted from the driver's license record. In the event that a plea of nolo contendere is accepted to a charge of violating Code Section 40-6-391, then the suspension shall be terminated, provided that the accepted plea of nolo contendere shall be entered on the driver's license record and shall be considered and counted as a conviction for purposes of any future violations of Code Section 40-6-

391. In the event of an acquittal, accepted plea of nolo contendere, or other disposition other than by a conviction, the driver's license restoration fee shall be promptly returned by the Department of Public Safety to the licensee.

(h) If the suspension is sustained after such a hearing, the person whose license has been suspended under this Code section shall have a right to file for a judicial review of the department's final decision, as provided for in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act"; while such appeal is pending, the order of the department shall not be stayed.

(Code 1981, Section 40-5-67.1, enacted by Ga. L. 1992, p. 2564, Section 6; Ga. L. 1994, p. 472, Section 1; Ga. L. 1994, p.1600, Section 3-6.)

**40-5-67.2. Terms and conditions for suspension of license under subsection (c) of Code Section 40-5-67.1.**

(a) Any driver's license required to be suspended under subsection (c) of Code Section 40-5-67.1 shall be suspended subject to the following terms and conditions:

(1) Upon the first suspension pursuant to subsection (c) of Code Section 40-5-67.1 within the previous five years, as measured from the dates of previous arrests for which a suspension was obtained to the date of the current arrest for which a suspension is obtained, the period of suspension shall be for three year. One hundred and twenty days following the expiration of the 20 day temporary driving permit, the person may apply to the Department of Public Safety for reinstatement of his driver's license. Such license shall be reinstated if such person submits proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program approved by the Department of Human Resources and pays a restoration fee of $210.00 or $200.00 when processed by mail. A driver's license suspended pursuant to Code Section 40-5-67.1 shall not become valid and shall remain suspended until such person submits proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program approved by the Department of Human Resources and pays the prescribed restoration fee.

(2) Upon the second or subsequent suspension pursuant to subsection (c) of Code Section 40-5-67.1 within five years, as measured from the dates of previous arrests for which suspensions were obtained to the date of the current arrest for which a suspension is obtained, the period of suspension shall be for five years. The driver may apply for a probationary license pursuant to Code Section 40-5-58 after the expiration of two years from the expiration of the 20 day temporary permit.

(b) An administrative license suspension pursuant to Code Section 40-5-67.1 shall run concurrently with any revocation of such driver's license pursuant to a subsequent determination that such person is a habitual violator.

(c) In all cases in which the department may return a license to a driver prior to the termination of the full period of suspension, the department may require such tests of driving skill and knowledge as it determines to be proper, and the department's discretion shall be guided by the driver's past

driving record and performance, and the driver shall pay a restoration fee of $21.00 or $200.00 when processed by mail.

**40-6-391. Driving under the influence of alcohol or drugs; penalties for first and second offenses; publication of notice of conviction for persons convicted for third time; endangering a child.**

(a) A person shall not drive or be in actual physical control of any moving vehicle while:

(1) Under the influence of alcohol to the extent that it is less safe for the person to drive;

(2) Under the influence of any drug to the extent that it is less safe for the person to drive;

(3) Under the combined influence of alcohol and any drug to the extent that it is less safe for the person to drive;

(4) The person's alcohol concentration is 0.10 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such driving or being in actual physical control ended; or

(5) Subject to the provisions of subsection (b) of this Code section, there is any amount of marijuana or a controlled substance, as defined in Code Section 16-13-21, present in the person's blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood.

(b) The fact that any person charged with violating this Code section is or has been legally entitled to use a drug shall not constitute a defense against any charge of violating this Code section; provided, however, that such person shall not be in violation of this Code section unless such person is rendered incapable of driving safely as a result of using a drug other than alcohol which such person is legally entitled to use.

(c) Every person convicted of violating this Code section shall, upon a first or second conviction thereof, be guilty of a misdemeanor and, upon a third or subsequent conviction thereof, be guilty of a high and aggravated misdemeanor and shall be punished as follows:

(1) First conviction with no conviction of and no plea of nolo contendere accepted to a charge of violating this Code section within the previous five years, as measured from the dates of previous arrests for which convictions were obtained or pleas of nolo contendere were accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted:

(A) A fine of not less than $300.00 nor more than $1,000.00, which fine shall not except as provided in subsection (g) of this Code section, be subject to suspension, stay, or probation;

(B) A period of imprisonment of not less than ten days nor more than 12 months, which period of imprisonment may, at the sole discretion of the judge, be suspended, stayed, or probated; and

(C) Not less than 40 hours of community service;

(2) For the second conviction within a five-year period of time, as measured from the dates or previous arrests for which convictions were obtained or pleas of nolo contendere were accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted:

(A) A fine of not less than $600.00 nor more than $1,000.00, which fine shall not, except as provided in subsection (g) of this Code section, be subject to suspension, stay, or probation;

(B) A period of imprisonment of not less than 90 days nor more than 12 months. At the sole discretion and under such terms and conditions as the judge shall impose, the judge may suspend, stay, or probate all but 48 hours of any term of imprisonment imposed under this paragraph; and

(C) Not less than 80 hours of community service; or

(3) For the third or subsequent conviction with a five-year period of time, as measured from the dates of previous arrests for which convictions were obtained or pleas of nolo contendere were accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted:

(A) A fine of not less than $1,000.00 and not more than $5,000.00, which fine shall not, except as provided in subsection (G) of this Code section, be subject to suspension, stay, or probation;

(B) A mandatory period of imprisonment of not less than 120 days nor more than 12 months. At the sole discretion and under such terms and conditions as the judge shall impose, the judge may suspend, stay, or probate all but ten days of any term of imprisonment imposed under this paragraph; and

(C) Not less than 20 days of community service.

For the purpose of imposing a sentence under this subsection, a plea of nolo contendere shall constitute a conviction.

(d) (1) Notwithstanding the limits set forth in any municipal charter, any municipal court of any municipality shall be authorized to impose the punishments provided for in this Code section upon a conviction of violating this Code section or upon conviction of violating any ordinance adopting the provisions of this Code section.

(2) Notwithstanding any provision of this Code section to the contrary, any court authorized to hear cases involving violations of this Code section shall be authorized to exercise the power to probate, suspend, or stay any sentence imposed. Such power shall, however, be limited to the conditions and limitations imposed by subsection (c) of this Code section.

(e) The foregoing limitations on punishment also shall apply when a defendant has been convicted of violating, by a single transaction, more than one of the four provisions of subsection (a) of this Code section.

(f) The provisions of Code Section 17-10-3, relating to general punishment for misdemeanors including traffic offenses, and the provisions of Article 3 of Chapter 8 of Title 42, relating to probation of first offenders, shall not apply to any person convicted of violating any provision of this Code section.

(g) (1) If the payment of the fine required under subsection (c) of this Code section will impose an economic hardship on the defendant, the judge, at his or her sole discretion, may order the defendant to pay such find in installments and such order may be enforced through a contempt

proceeding or a revocation of any probation otherwise authorized by this Code section.

(2) In the sole discretion of the judge, he or she may suspend up to one-half of the fine imposed under paragraph (3) of subsection (c) of this Code section for a third or subsequent conviction conditioned upon the defendant's undergoing an alcohol or drug treatment program approved by the court.

(h) For purposes of determining under this chapter prior convictions of pleas of nolo contendere to violating this Code section, in addition to the offense prohibited by this Code section, a conviction of or plea of nolo contendere to any of the following offenses shall be deemed to be a violation of this Code section:

(1) Any federal law substantially conforming to or parallel with the offense covered under this Code section;

(2) Any local ordinance adopted pursuant to Article 14 of this chapter, which ordinance adopts the provisions of this Code section; or

(3) Any previously or currently existing law of this or any other state, which law was or is substantially conforming to or parallel with this Code section.

(I) A person shall not drive or be in actual physical control of any moving commercial motor vehicle while there is 0.04 percent or more by weight of alcohol in such person's blood, breath, or urine. Every person convicted of violating this subsection shall be guilty of a misdemeanor and, in addition to any disqualification resulting under Article 7 of Chapter 5 of this title, the "Uniform Commercial Driver's License Act," shall be fined as provided in subsection (c) of this Code section.

(j) (1) The clerk of the court in which a person is convicted a third time under subsection (c) of this Code section shall cause to be published a notice of conviction for each such person convicted. Such notices of conviction shall be published in the manner of legal notices in the legal organ of the county in which such person resides or, in the case of nonresidents, in the legal organ of the county in which the person was convicted. Such notice of conviction shall be one column wide by two inches long and shall contain the photograph taken by the arresting law

enforcement agency at the time of arrest, name, and address of the convicted person and the date, time, place of arrest, and disposition of the case and shall be published once in the legal organ of the appropriate county in the second week following such conviction or as soon thereafter as publication may be made.

(2) The convicted person for which a notice of conviction is published pursuant to this subsection shall be assessed $25.00 for the cost of publication of such notice and such assessment shall be imposed at the time of conviction in addition to any other fine imposed pursuant to this Code section.

(3) The clerk of the court, the publisher of any legal organ which publishes a notice of conviction, and any other person involved in the publication of an erroneous notice of conviction shall be immune from civil or criminal liability for such erroneous publication, provided such publication was made in good faith.

(k) A person under the age of 18 shall not drive or be in actual physical control of any moving vehicle while the person's alcohol concentration is 0.04 grams or more at any time within three hours after such driving or being in actual physical control ended. Every person convicted of violating this subsection shall be guilty of a misdemeanor for the first and second convictions and upon a third or subsequent conviction thereof be guilty of a high and aggravated misdemeanor and shall be punished and fined as provided in subsection (c) of this Code section. No plea of nolo contendere shall be accepted for any person under the age of 18 charged with a violation of this Code section.

(1) A person who violates this Code section while transporting in a motor vehicle a child under the age of 14 years is guilty of the separate offense of endangering a child by driving under the influence of alcohol or drugs. The offense of endangering a child by driving under the influence of alcohol or drugs shall not be merged with the offense of driving under the influence of alcohol or drugs for the purposes of prosecution and sentencing. An offender who is convicted of a violation of this subsection shall be punished in accordance with the provisions of subsection (d) of Code Section 16-12-1, relating to the offense of contributing to the delinquency, unruliness, or deprivation of a child. (Ga. L. 1953, Nov.-Dec. Sess., p. 556, Section 47; Ga. L. 1968, p. 448, Section 1; Code 1933, Section 68A-902, enacted by Ga. L. 1974, p. 633, Section 1; Ga. L.

1983, p. 1000, Section 12; Ga. L. 1984, p. 22, Section 40; Ga. L. 1985, p. 149, Section 40; Ga. L. 1985, p. 758, Section 17; Ga. L. 1987, p. 3, Section 40; Ga. L. 1987, p. 904, Section 1; Ga. L. 1988, p. 1893, Section 2; Ga. L. 1989, p. 14, Section 40; Ga. L. 1990, p. 2048, Section 5; Ga. L. 1991, p. 1886, Sections 6-8; Ga. L. 1992, p. 2556, Section 2; Ga. L. 1994, p. 1600, Section 8.)

IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

| | |
|---|---|
| CHRISTOPHER NOLEN, | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| - versus - | ) |
| | ) |
| STATE OF GEORGIA, | ) |
| | ) |
| Respondent. | ) |

CERTIFICATE OF SERVICE

I, Bruce F. Morriss, hereby certify that I have served the State of Georgia with the foregoing Petition for Writ of Certiorari by depositing three (3) true and correct copies of the same in the United States Mail, with sufficient first-class postage affixed thereto to ensure delivery, addressed to counsel for the State of Georgia as follows:

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This 25 day of April, 1996.

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Supreme Court, U.S.
FILED
JUN 5 1996
CLERK

No. 95-1750

In The

# Supreme Court of the United States

October Term, 1995

CHRISTOPHER NOLEN,

*Petitioner,*

v.

STATE OF GEORGIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

(1) Whether, in light of the construction of the state statute in question by the courts of the State of Georgia as having the protection of the public as its paramount purpose, and that any deterrent effect is merely incidental to that paramount legislative purpose, Petitioner's claim presents a substantial federal question for review?

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## OPINIONS BELOW

Opinions were issued in this case by the State Court of Gwinnett County, the Georgia Court of Appeals, and the Supreme Court of Georgia. The opinion of the Georgia Court of Appeals is reported at 218 Ga. App. 819, 463 S.E.2d 504 (1995). The Orders of the State Court of Gwinnett County, and of the Georgia Supreme Court, are unreported. Each opinion is attached to Petitioner's Petition for Writ of Certiorari as appendices.

## JURISDICTION

Petitioner apparently premises the jurisdiction of this Court upon Rule 10(c) of the Rules of the Supreme Court of the United States. However, this rule is not a basis for jurisidiction at all, but rather an advisement by the Court of a general class of cases in which a request for certiorari may be granted. Rather, jurisdiction is conferred by 28 U.S.C. § 1257(a).

Respondent submits that the ultimate issue in this action, as presented by the petition, is Petitioner's contention that the construction and interpretation of O.C.G.A. § 40-5-67.1 by the Georgia Court of Appeals is erroneous. Because this Court lacks jurisdiction to review the construction of state statutes by the courts of the state, this Court lacks jurisdiction to consider the issues presented by the petition.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOKED

Petitioner has cited the relevant constitutional and statutory provisions in the petition.

## STATEMENT OF THE CASE

The instant action is one of two companion cases resolved by the Georgia Court of Appeals in double jeopardy challenges to Georgia's Administrative License Suspension Act. Georgia's act applies to two categories of drivers: those who refuse to submit to the state-administered chemical test(s) designated by a law enforcement officer and those who take the test, but whose results are above a designated level (which varies depending upon the age of the driver and the type of vehicle driven). The requirement of testing also applies to two categories of drivers: those arrested and charged with driving under the influence and those involved in a serious traffic accident.

In the case at bar, the record reflects that Petitioner was arrested on May 28, 1994, and charged with driving under the influence. He was issued a DPS Form 1205 (a notice of the intent to suspend his driver's license) by the arresting officer. Neither the petition nor the appendices thereto indicate the reason for the issuance of the form (i.e., whether Petitioner refused to submit to the designated test or because the results were above the applicable amount). The petition and the appendices thereto also do not indicate whether or not the arrest of Petitioner

followed the investigation of a serious traffic accident, or whether he was arrested following a traffic stop or at a driver's license checkpoint. The record reflects that, following an administrative hearing, the suspension was withdrawn. The record does not, however, reflect the reason for the withdrawal of the suspension.

Following the conclusion of the administrative proceeding, Petitioner filed a Motion for Discharge and Acquittal, contending that the license suspension hearing constituted a prosecution which had been concluded and that further prosecution of the criminal charges in the State Court of Gwinnett County constituted double jeopardy. The State Court denied the motion. Under Georgia law, a plea of double jeopardy is subject to interlocutory appeal unless the State contends, and the Court finds, that the appeal is frivolous and is interposed for the purpose of delay. No such contention was made in this case, and Petitioner took an appeal to the Georgia Court of Appeals.

That Court heard the case *en banc* (or, in the Georgia parlance, as a "whole court") and issued an opinion on October 2, 1995, affirming the judgment of the State Court. Construing the statute, the Court found that its "paramount purpose" was to protect the public from dangerous drivers, and that any deterrent effect was merely "incidental." The Court found no punitive purpose whatsoever. The Court denied reconsideration on October 26, 1995, and the Supreme Court of Georgia unanimously denied certiorari on January 26, 1996. The Petition for Writ of Certiorari was served on April 25, 1996, and apparently filed with this Court that same day.

## REASONS WHY THE WRIT SHOULD BE DENIED

### A. THIS COURT CANNOT REVIEW THE CONSTRUCTION OF A STATE STATUTE BY THE COURTS OF THAT STATE.

While a cursory review of the petition might leave the impression that Petitioner presents a challenge to a state statute under the double jeopardy clause (U.S. Const. Amend. V), a closer review reveals that such is not the case. Petitioner in fact challenges the correctness of the construction of that statute by the Georgia Court of Appeals; specifically, that court's finding that the statute in question has as its purpose the "protect[ion of] public safety, and the deterrent effect is only incidental. . . . " *Nolen v. State*, 218 Ga. App. 819, 823, 463 S.E.2d 504 (1995).

This Court has repeatedly held that, under basic principles of federalism inherent in the United States Constitution, it cannot review the construction of state statutes by courts of the state. *See, e.g., O'Connell v. Kirchner*, ___ U.S. ___, 115 S.Ct. 891, 130 L.Ed.2d 873 (1995), in which Justice Stevens noted that, despite the petitioners' claims that state law entitled them to more process than had been afforded, the federal courts were bound by the state supreme court's determination that no such process was mandated by state law.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), the Court held that:

> Where a state court has interpreted a provision of state law, we cannot ignore that interpretation, even if it is not one that we would have

> reached if we were construing the statute in the first instance.

*R.A.V.*, 505 U.S. at 412. In the case at bar, the Georgia Court of Appeals has construed the legislative purpose as the single purpose of protection of the public, and that any deterrent effect is simply providential and unintended. Under this Court's precedents, such a holding mandates the conclusion that the statute does not offend double jeopardy.

### B. A REMEDIAL STATUTE, SUCH AS O.C.G.A. § 40-5-67.1, DOES NOT OFFEND THE DOUBLE JEOPARDY CLAUSE.

In the petition, Petitioner relies upon three recent cases decided by this Court. Those cases are *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989); *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). In addition to the fact that the Court found a violation in each instance, the cases have another common thread: none involved a prior construction of a state statute by the courts of the state. Both *Halper* and *Austin* dealt with federal statutes, which this Court is responsible for construing; *Kurth Ranch* arose in the United States Bankruptcy Court, which construed the Montana statute itself. The Montana courts apparently had not previously construed the statute and were not asked to do so in that case. In the case at bar, the Georgia courts have construed the statute in question, finding that its purpose is prophylactic rather than punitive. Thus, the

*Halper/Austin/Kurth Ranch* test, which focuses how to construe a challenged statute, is not applicable in the case at bar, because the statute has already been construed by the state courts in a manner which comports with the constitutional requirements.

Indeed, when *Halper, Austin,* and *Kurth Ranch* are applied to the statute as construed, it is apparent that there has been no violation of the double jeopardy clause. As noted *supra,* the Georgia Court of Appeals found that the purpose of the statute was the protection of the public, and that any deterrent effect was merely incidental. That construction having been given, it is clear that the statute is not subject to challenge on double jeopardy grounds because its purpose is not to deter or punish. *Austin,* 113 S.Ct. at 2812.

### C. O.C.G.A. § 40-5-67.1 IS REMEDIAL EVEN WHEN CONSTRUED IN THE FIRST INSTANCE.

Even if O.C.G.A. § 40-5-67.1 had not previously been construed by the Georgia courts, proper statutory construction compels the conclusion that its purposes are remedial, rather than punitive. Petitioner relies upon three prior decisions of this Court; however, proper application of those opinions to this case mandates the conclusion that the state construction was correct.

In *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), the Court dealt with a civil remedy pursued only after a prior criminal conviction. The *Halper* Court contemplated that its application would be limited to the "rare" case in which the intent to punish

was unmistakable. *Id.*, at 449. The Court also limited its holding to punitive civil actions following a criminal prosecution. *Id.*, at 448. Of course, *Halper* dealt with the imposition of money damages, which could be mechanically compared with the actual injury to the Government to aid in the determination of the legislative purpose.

When the Court reviewed a forfeiture provision in *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), the Court found that the historical understanding of forfeitures as punishment, coupled with evidence of legislative intent as to the specific statute in issue demonstrating "that Congress understood those provisions as serving to deter and to punish," mandated the conclusion that the forfeiture statute was punitive, rather than remedial. *Id.*, at 2812.

Finally, in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), the Court reviewed a Montana statute taxing marijuana. The *Kurth Ranch* Court reaffirmed that *Halper* was limited to civil proceedings following a criminal prosecution (the same scenario is present in *Kurth Ranch*, but not in the case at bar). *Id.*, at 1944. The Court also reaffirmed that the perspective of the defendant (that is, whether the statutory consequences "feel" like punishment) is irrelevant to the determination. *Id.*, at 1944 n.14; *see also Halper*, 490 U.S. at 447 n.7. Again, the Court dealt with a monetary imposition (in this case, a tax) which could be mechanically, if roughly, compared to the damage done in determining if the tax was punitive in nature.

By contrast, the Georgia statute is non-monetary. It mandates the suspension of the driver's license, a mere

privilege, as a consequence of either a refusal to submit to testing or submission with results above the statutory minimum, by a driver either arrested and charged with driving under the influence or involved in a serious traffic accident. The Georgia General Assembly has expressly stated that the purpose of its implied consent and administrative license suspension laws is to immediately remove intoxicated, dangerous, and negligent drivers from the highways of the State, because they present a direct and immediate threat to the welfare and safety of the general public. O.C.G.A. § 40-5-57; O.C.G.A. § 40-5-55(a). Thus, the Georgia Court of Appeals did not err in concluding that the driver's license suspension was not punitive in nature, but remedial, and thus did not implicate the double jeopardy clause.

Petitioner's attempt to apply the *Kurth Ranch* test to this case is seriously flawed. Upon closer examination, it can be seen that the test does not mandate the conclusion that the statute is punitive in character; rather, it mandates the contrary conclusion.

The first factor is whether or not the suspension is conditioned upon the commission of a crime. Petitioner states that this is the case here and notes that the Court stated that this condition is a significant indicator of penal intent on the part of the legislature. *Kurth Ranch*, 114 S.Ct. at 1947. However, the Georgia statute is not so limited. While applicable to drivers arrested for driving under the influence, it is equally applicable to all drivers who are involved in a serious traffic accident. O.C.G.A. § 40-5-55(a). A serious traffic accident is one in which an occupant of one of the vehicles involved in the accident is killed or suffers an enumerated physical

injury. O.C.G.A. § 40-5-55(c). Thus, the statute is not limited to those who have committed a crime, and the converse of the Court's statement must apply: the fact that the statute is not exclusively conditioned upon the commission of a crime is a powerful indicator that the legislative intent was *not* punitive.

For the same reasons, again contrary to Petitioner's argument, neither the second nor third *Kurth Ranch* factors support Petitioner's claims: the suspension is not applicable solely to those driving under the influence, and those drivers are not the entire class of persons subject to the suspension.

While the fourth and fifth factors are present, neither mandates a contrary conclusion. Petitioner makes much of the fact that the license suspension is imposed in a separate proceeding; however, that fact demonstrates nothing. Indeed, Respondent submits that, if the suspension were to be imposed in the same proceeding, that fact would point to, if not establish, the punitive character of such a suspension; the fact that there are separate proceedings is equally powerful evidence that the Georgia General Assembly understood the suspension procedure to be remedial and not punitive in character.

Thus, application of the *Kurth Ranch* test also mandates the conclusion that O.C.G.A. § 40-5-67.1 and the other statutes implicated in Georgia's administrative license suspension statute are remedial, not punitive, in nature. Thus, the prosecution of Petitioner on the criminal charge of driving under the influence is not a violation of the double jeopardy clause of Amendment Five.

### D. THIS RECORD IS INSUFFICIENTLY DEVELOPED TO WARRANT REVIEW.

In the case at bar, Petitioner mounts a broad-based challenge to Georgia's administrative license suspension statutory scheme. Under the provisions of these statutes, the Georgia Department of Public Safety is called upon to suspend thousands of driver's licenses each year. Because of the potentially broad sweep of Petitioner's brush, it is essential that this Court have before it all of the facts necessary to full consideration of the issues.

In this case, the petition and appendices do not even reflect why Petitioner's driver's license was initially suspended. Because the analysis necessarily must differ depending upon whether or not the suspension was based upon a refusal to submit to chemical testing or a submission with test results above the minimum established by law, this shortcoming is crucial. Similarly, as noted by the Court of Appeals, the record does not reflect the reason for the withdrawal of the license suspension by the Administrative Law Judge. Thus, this case is not appropriate for review by this Court.

## CONCLUSION

The Petition for Writ of Certiorari presents no substantial federal questions for review. The statute has been construed by the Georgia Courts, which have determined that the statute is remedial, rather than punitive, in purpose. This Court does not sit to review the correctness of a state court's interpretation of its own law. Because the

purpose of the statute is remedial, not punitive, the double jeopardy clause is not offended by the suspension of Petitioner's driver's license and prosecution on criminal charges for driving under the influence in separate proceedings. Even if the statute is construed by this Court, its purpose is clearly remedial and not punitive. For the above and foregoing reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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